Supreme Court, U.S.
FILED

No. 02-1424 MAR 25 2003

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FRED BERRE DOUGLAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
FREDERICK R. MILLAR, JR.
Deputy Attorney General
PAT ZAHAROPOULOS
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2209
Fax: (619) 645-2191
Counsel for Petitioner

CAPITAL CASE
QUESTIONS PRESENTED

1. Does prejudice under *Strickland* require a reasonable probability of a different verdict or just a single juror who would not vote for death had the mitigating evidence found by habeas counsel been presented?

2. Does the Sixth Amendment right to effective assistance of counsel require a defense attorney to "unearth" and present "all relevant mitigating information . . . for consideration at the capital sentencing phase" despite the defendant's opposition and roadblocks?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL ISSUE INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
Guilt Phase	2
Penalty Phase Trial	4
Federal Evidentiary Hearing On Claims Including Effective Assistance Of Counsel At Penalty Phase	5
District Court Findings When Denying Relief	7
REASONS FOR GRANTING THE WRIT	8
SUMMARY OF ARGUMENT	9
A. The Ninth Circuit Erroneously Construed The Prejudice Prong Of *Strickland* By Holding That A Single Juror Might Not Have Voted For Death Had All The Evidence Found By Habeas Counsel Been Presented At Trial	10
B. The Reasonableness Of Trial Counsel's Investigation Of Social And Mental History	

TABLE OF CONTENTS (continued)

Page

Must Be Judged On The Reasonableness Of What He Did Under The Circumstances, Not What Habeas Counsel Found Or What Should Have Been Done Based On Theories Or Evidence Developed By Habeas Counsel 16

CONCLUSION 25

TABLE OF AUTHORITIES

Cases	Page
Babbitt v. Calerdon 151 F.3d 1170 (1998) *cert. denied* 525 U.S. 1159 (2000)	16, 18, 19
Bell v. Cone 535 U.S. 685 122 S. Ct. 1843 152 L. Ed. 2d 914 (2002)	18
Boyde v. California, 494 U.S. 370 (1989)	13
Branch v. Tunnell 14 F.3d 449 (9th Cir. 1994)	20
Burger v.Kemp 483 U.S. 776 (1987)	22
Card v. Dugger 911 F.2d 1494 (11th Cir. 1990)	20
Caro v. Calderon, 165 F.3d 1223 (9th Cir. 1999)	18, 19, 21
Caro v. Woodford 280 F.3d 1247 (9th Cir. 2002)	18, 20, 21

TABLE OF AUTHORITIES (continued)

	Page
Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000)	22
Darden v. Wainwright 477 U.S. 168 (1986)	22
Duren v. Hopper, 161 F.3d 655 (11th Cir. 1998)	15
Early v. Packer, __ U.S. __, 123 S.Ct. 362 154 L.Ed.2d 263 (2002)	24
Easley v. Clarke, No. 00-16205 (9th Cir. February 21, 2002)	21
Gentry v. Roe, __ F.3d __(9th Cir. 2003) 2003 Daily Journal D.A.R. 1092	23
Gilliam v. State 331 Md. 651 629 A. 2d 685 (1993) *cert. denied* 510 U.S. 1077 (1994)	21
Harris v. Dugger 874 F.2d 756 (11th Cir. 1989) *cert denied* 493 U.S. 1011 (1989)	22

TABLE OF AUTHORITIES (continued)

	Page
In re Jesse James Andrews, 28 Cal. 4th 1234 52 P.3d 656 124 Cal. Rptr. 2d 473 (2002)	17
Jennings v. Woodward, 290 F.3d 1006 (9th Cir. 2002)	22
Johnson v. Norris 207 F.3d 515 (8th Cir. 2000)	14, 15
Karis v. Calderon 283 F.3d 1117 (9th Cir. 2002)	12
Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002)	22
Kevin Wiggins v. Smith, 02-311	21
Lamb v. Johnson 179 F.3d 352 (5th Cir. 1999)	14
Lockhard v. McCree 476 U.S. 162 (1986)	11
Lockhart v. McCree, 476 U.S. 162, 181 (1986)	22
McMann v. Richardson 397 U.S. 759 (1970)	8

TABLE OF AUTHORITIES (continued)

	Page
Mickens v. Taylor 535 U.S. 162 (2002)	9, 10
More v. Gibson, 195 F.3d 1152 (10th Cir. 1999)	15
Neal v. Puckett 239 F.3d 683 (5th Cir. 2001)	14
People v. Andrews 49 Cal. 3d 200 776 P.2d 285 260 Cal. Rptr. 583 (1989)	17
People v. Douglas 50 Cal.3d 468 788 P.2d 640 268 Cal. Rptr. 126 (1990)	2
People v. Samayoa 15 Cal. 4th 795 938 P.2d 2 64 Cal. Rptr. 2d 400 (1997)	11
People v. Thompson 50 Cal. 3d 134 785 P.2d 857 266 Cal. Rptr. 309 (1990)	11
Perry v. McCaughtry 308 F.3d 682 (7th Cir. 2002)	14

TABLE OF AUTHORITIES (continued)

	Page
Poyner v. Murray 964 F.2d 1404 (4th Cir. 1992) *cert. denied* 506 U.S. 958 (1992)	20
Roe v. Flores-Ortega 528 U.S. 470 (2000)	18, 20
Sidebottom v. Delo 46 F.3d 744 (8th Cir. 1995) *cert. denied* 516 U.S. 849 (1995)	20
Silva v. Woodford 279 F.3d 825 (9th Cir. 2002)	21
Siripongs v. Calderon 133 F.3d 732 (9th Cir. 1998)	18
Strickland v. Washington 466 U.S. 668 (1984)	8-12, 14-16, 18-21
Tarver v. Hopper 169 F.3d 710 (11th Cir. 1999)	22
Teague v. Lane 489 U.S. 288 (1989)	12, 21
Thomas v. Gilmore 144 F.3d 513 (7th Cir. 1998)	15, 16

TABLE OF AUTHORITIES (continued)

	Page
U.S. v. Cronic 466 U.S. 648 (1984)	10
Wallace v. Stewart 184 F.3d 1112 (9th Cir. 1999) *cert. denied* 528 U.S. 1105 (2000)	21
Williams v. Taylor 163 F.3d 860 (4th Cir. 1998)	14, 21
Williams v. Taylor 529 U.S. 362 (2000)	8
Woodford v. Visciotti, __U.S. __ 123 S. Ct. 357 154 L.Ed.2d 279 (2002)	23
Woodford. v. Silva, 279 F.3d 849 (9th Cir. 2002)	16
Constitutional Provisions	
United States Constitution Sixth Amendment	2, 8, 10

TABLE OF AUTHORITIES (continued)

Page

Statutes

California. Penal Code
§ 190.4(b) 11

Other Authorities

Stephen P. Garvey
Aggravation and Mitigation in Capital Cases: What do Jurors Think?
98 Colum. L. Rev. 1538 (1998) 11, 23

William S. Geimer & Jonathan Amsterdam
Why Jurors Vote Life or Death, Operative Factors in Ten Florida Death Penalty Cases
15 Am. J. Crim. L. 1 (1988) 11, 23

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FRED BERRE DOUGLAS, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals reversed Douglas' death penalty after the district court had found effective assistance of counsel under *Strickland.* (App. A at 1-25, *Douglas v. Woodford*, __ F.3d __ (9th Cir. 2003). The order of the District Court denying habeas corpus relief is unreported. (App. B at 26-132.)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on January 24, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL ISSUE INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. (Sixth Amendment to the United States Constitution.)

STATEMENT OF THE CASE

Douglas' conviction and death sentence were affirmed by the California Supreme Court nearly thirteen years ago. *People v. Douglas*, 50 Cal.3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990). On January 19, 1994, he filed a federal habeas corpus petition alleging ineffective assistance of counsel and was ultimately granted an evidentiary hearing on several allegations of ineffective assistance.

Evidence was taken from February 17 to February 20, 1998, and both parties presented full briefing of the issues to the district court. On November 9, 2000, the district court denied the petition for habeas corpus relief in a 110-page unpublished opinion. (App. B at 26-132, Facts 27-31 Ineffective Assistance at Penalty.)

On appeal, the Ninth Circuit reversed Douglas' death penalty finding insufficient investigation by Douglas' trial counsel of evidence in mitigation and prejudice, because a single juror at trial may have voted against death had he or she heard the evidence unearthed by habeas counsel. (App. A at 16-18.)

STATEMENT OF FACTS

Guilt Phase

On August 13, 1982, Douglas killed two teenage girls, Peggy Krueger and Beth Jones, in the desert near Indio, California, after promising them money for nude bondage photographs. Douglas tied up the naked girls, ordered them to

perform sexual acts with each other and him, then strangled both girls. He instructed Richard Hernandez, a man he employed in the Orange County furniture refinishing and upholstery shop Douglas owned and operated,[1] to bury the bodies. They returned to Douglas' shop. Within a couple of days, Douglas and Hernandez left Orange County, first for Canada and later for Mexico, after being questioned about the disappearance of the two girls.

On March 27, 1983, a photographer taking pictures of wild-flowers in the desert discovered the grave of the two girls and reported it to authorities. Subsequently, Douglas was arrested in Las Vegas in February 1984, and Hernandez was captured in Mexico and turned over to Orange County law enforcement officers in March.

After negotiating immunity, Hernandez testified about Douglas' prior nude photographs of Hernandez with various women, Douglas' planning the outing with Krueger and Jones and the details of their murders.

Douglas presented an alibi defense and asserted Hernandez was lying. A friend of Krueger testified she saw both victims at a mall one month after Hernandez said the girls were killed. Douglas' business associate testified that he had spoken to Douglas by telephone between 5:00 and 6:30 a.m. on August 13, 1982, the same time Hernandez testified that he and Douglas were driving to the desert with the victims. He remembered the date because he was writing a check to send an employee to A-1 Foam to pick up materials.

On rebuttal, an A-1 Foam employee testified his company did not take two-party checks, the sales slip indicated the owner had picked up the materials and the check was not

---

1. Hernandez was a retarded heroin addict who was paid with food, beer, lodging and occasional, minor, spending money.

written up ahead of time because a $1 item had been added to the original order.

Penalty Phase Trial

In 1976, a woman who worked for Douglas at his lounge/Italian restaurant agreed to pose for nude photographs. In the desert, Douglas showed her a gun and she feared for her life while posing for him.

A second woman testified she was going to model clothes in Yucca Valley but she passed out after Douglas grabbed her from behind. When she woke up, she was tied and naked. Douglas was standing in front of her with a pistol in his hand. He put the gun to her head and ordered her to urinate on him or he would kill her. He also forced her to orally copulate him. She ultimately talked Douglas into untying her and making her his partner in his plan to pick up hitchhikers, torture them, photograph the agony on their faces, and kill them for a book to be published in Canada. She went to the police when she saw newspaper articles about Douglas' arrest in this case.

In June or July of 1977, a third woman, who was working as a prostitute, was hired by Douglas, who spoke to her about snuff movies. He wanted her to find young girls, preferably thirteen to fourteen years old, who would be tied up for photos or porno films. The woman was to torture them while he took pictures. While watching a movie about child abuse, the woman "got a feeling this guy is for real" so she called the police. She met with Douglas while wearing a body wire and introduced two policewomen to him as potential victims. The four of them went to the desert, where Douglas was arrested. He was tried on those crimes but the jury was unable to reach a verdict.

In mitigation, the defense introduced the testimony of Douglas' wife of thirty-three years, their son, a long-time friend, and a neighbor, who all testified Douglas was not capable of killing anyone. They described him as a kind man who had

been raised as an orphan by several families that did not treat him well. He ran away from home in Chicago at the age of fifteen to enlist in the Marines and organized recreational activities in the military. As an adult he was hard working and generous. He was a "soft touch" for people who needed food or other help.

Federal Evidentiary Hearing On Claims Including Effective Assistance Of Counsel At Penalty Phase

Attorney George Peters was appointed to represent Douglas on March 8, 1984. He had psychiatrist Kaushal Sharma and psychologist Martha Rogers appointed to help him evaluate Douglas for any serious psychological problems, although Peters did not see ". . . anything amounting to competency problems or psychosis problems." Drs. Sharma and Rogers did not find any evidence of lack of competence or psychosis. Nevertheless, Peters hoped to dig deeper into the subject although Douglas maintained there was nothing wrong with him, was furious at his prior attorney for characterizing him as a dirty old man, said he never solicited or intended to commit murder, and was "very, very adamant" about his alibi witnesses. Informally, Peters continued to consult with Dr. Rogers, who informally told Peters, Douglas was "not crazy. He's not insane. He's not incompetent, He's weird." Peters had the same reaction. (See App. B at 85-86, 79-80.)

Peters still hoped to find some mental aspect relevant to first degree murder or special circumstances. For example, he tried unsuccessfully to broach with Douglas the suggestion by Dr. Rogers that there could be some latent homosexual aspects to the murder. Given the client's demand that Peters not delve into his mental health and the inability of the two experts to find any evidence of lack of competency and psychosis, Peters explored as many pre-trial legal issues as possible. He also attacked the credibility of Hernandez, combined with the best witnesses he could find for Douglas' alibi. (Douglas'

credibility with his attorney was eroded by the fact that many alibi witnesses did not stand up to Peters' questioning.) (See App. B at 79-80.)

Douglas "was extremely adamant" throughout the entire trial that he did not want psychological defenses presented, and he admitted only to having claustrophobia. Also, he would not make any admission regarding the murders or even being present at the murder scene. Douglas "had an aversion to [psychological] testing and maintained he was innocent" and would not allow psychological testing to be used at the guilt phase or to explain the crimes at the penalty phase. (See App. B at 79-80.)

Peters spoke with the attorney who had represented Douglas in the 1977 charges and had discussed the 1977 case with Douglas. However, Peters and his investigators did not locate Dr. Lewis Broussard, who had concluded that Douglas was psychotic and delusional at the time of the 1976 and 1977 incidents. Dr. Broussard was never called as a witness in the 1977 case. He did not maintain any tests, scores or notes from Douglas' 1977 case. (See App. B at 79-80.)

At the evidentiary hearing in the district court, Dr. Broussard testified that he believed Douglas was unable to run his own business in the 1970's and 1980's and that Hernandez (Douglas' retarded, heroin addicted, employee who worked for Douglas for food, beer and small change) was the mastermind of the capital crimes. (App. B at 80-82.)

In the late 1970's and early 1980's, Douglas owned and operated several businesses in Orange County including an Italian restaurant, bars and an upholstery-refinishing shop. He also trained his son how to estimate jobs, do the work and run the upholstery-refinishing business. (See App. B at 88.)

Douglas was neglected and physically punished as a child and may have been sexually abused in one of his foster homes. He was raised in poverty. (App. B at 96-99.) Doctors hired by habeas counsel who examined Douglas on death row in the 1990's opined, in differing diagnoses, that Douglas

suffered from delusions, mania, depression, bipolar disorder and frontal lobe damage. (App. B at 82-84.)

Dr. Rogers, who had spent five hours interviewing Douglas plus two hours testing him in 1984, saw no indication of major mental disorder and reported that fact to attorney Peters. She administered eight tests and Douglas was "very quick, very attentive and very quick." While the main purpose of her evaluation was to assess Douglas' claustrophobia, "... no mental health evaluator is going to go in and look just at phobia. You want to get some generic picture of a person and I did a general screening to look at the possibility of other issues." (App. B at 84-85.)

Dr. Rogers sat in on testimony of Douglas' experts at the evidentiary hearing. She also compared the 1997-1998 MMPI administered by Dr. Van Gorp to her own 1984 testing and found the results of both tests very similar. She also compared the 1984 and 1997 Rorschach tests and found the indicators were not consistent with a major mental disorder. Dr. Rogers did not change her opinion, that there was no indication of major mental disorder in Douglas. (App. B at 84.)

District Court Findings When Denying Relief

The district court expressly found that trial counsel conducted a constitutionally acceptable investigation into Douglas' background and mental state. (App. B at 85.) Further, none of the experts retained by Douglas on habeas corpus provided compelling evidence of a mental disorder, disease or defect. (App. B at 87-88.) The district court summarized the expert testimony given at the evidentiary hearing, evaluated the credibility of the witnesses and addressed Douglas' specific claims.

The district court heard witnesses at the evidentiary hearing regarding additional evidence that could have been presented regarding Douglas' background, character and mental state. (App. B at 96-99.) The court expressly found the trial

attorney's failure to uncover the background information was not constitutionally deficient, largely because Douglas himself told his attorney he did not know who his mother was and no birth certificate existed for him. The attorney verified the lack of a birth certificate and did not send anyone to Chicago to investigate further because Douglas falsely told him that his parents were dead and his childhood was a "blank." (App. B at 99-101.)

The district court further found that the trial attorney clearly considered presenting mental health evidence at the penalty phase and had two mental health experts appointed to assess his client's mental state, but Douglas stopped cooperating with the mental health experts and wanted nothing to do with psychiatric defenses of any sort. Consequently, the attorney reasonably relied on the experts he had retained and the fact that they found no mental defect or illness relevant to his case. (App. B at 93-94, 99-101.)

REASONS FOR GRANTING THE WRIT

This case presents an opportunity for this Court to correct distortions of both prongs of the *Strickland* test by the Ninth Circuit, to determine whether a reasonable probability of a different vote by a single juror in a capital case satisfies the reasonable probability of a "different result" requirement of prejudice under *Strickland* and to establish uniformity among the circuits.

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). A state prisoner claiming violation of this right must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "It is past question," *Williams v. Taylor*, 529 U.S. 362, 390 (2000), that *Strickland* sets forth the rules by which any claim of ineffective assistance by trial counsel must be judged.

It is equally clear the same standards apply to both the guilt and penalty phases of a capital trial. *Strickland*, 466 U.S. at 686-87

"As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002), *citing Strickland* at 694.

This case erroneously reversed the penalty phase of Douglas' capital murder by holding one juror may have voted against death had he or she heard the medical and social evidence presented on habeas. The State contends a reasonable probability of changing the vote of a single juror is not sufficient to constitute a reasonable probability of a different "result" within the meaning of *Strickland*.

Further, the Ninth Circuit also held it was "imperative that all relevant mitigating evidence be unearthed so the trial attorney should have continued to investigate Douglas' medical-social history despite Douglas' roadblocks that the district court found justified the attorney's abandonment of further investigation.

SUMMARY OF ARGUMENT

On appeal, the Ninth Circuit reversed the district court and Douglas' death penalty, based on its conclusion that one juror might not have voted for death had the mental and social histories unearthed by habeas counsel been presented at trial. The reasonable probability of a different "result" requirement of *Strickland* for prejudice should require a reasonable probability of a different verdict by the entire jury.

The Ninth Circuit also established a new rule for the performance prong of *Strickland*. Professional error in conducting the mitigation investigation was judged by evidence habeas counsel unearthed, rather than by evaluating the reasonableness of what the defense attorney in fact did in 1984 under the circumstances of this case. The Ninth Circuit also

ignored the district court's factual finding that Douglas stopped cooperating with mental health experts and obstructed further investigation of his social history, and boldly stated that lingering doubt was "not a viable option" at penalty.

Therefore, certiorari should be granted to correct the distortions of both prongs of the *Strickland* test involved in reversing Douglas' penalty.

A. The Ninth Circuit Erroneously Construed The Prejudice Prong Of *Strickland* By Holding That A Single Juror Might Not Have Voted For Death Had All The Evidence Found By Habeas Counsel Been Presented At Trial

The district court denied habeas relief after finding neither ineffective investigation nor prejudice. In overturning the death sentence in this pre-AEDPA case, the Ninth Circuit used the wrong test for prejudice. It stated that a single juror may have changed his or her vote based on the evidence uncovered by habeas counsel which had not been found by the trial attorney nearly twenty years ago. Prejudice should require a reasonable probability of a different jury verdict.

As explained in *Mickens* (slip op. at 3-4), the Court has established limited exceptions to the requirement of an "individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." One may arise where trial counsel actively represented conflicting interests (*id.*), a circumstance not at issue in this case. Otherwise a defendant may be entitled to a presumption of prejudicial effect "where counsel has been denied entirely or during a critical stage of the proceeding." *Id.* at 8. The Court explained in *U.S. v. Cronic*, 466 U.S. 648, 659 (1984), that other than a complete absence of counsel a denial of the Sixth Amendment right may occur "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ."

A single juror does not yield a different "result" within the meaning of *Strickland*. Under California law, if a jury is not able to reach a verdict on penalty, the trial court has no authority to enter a judgment of life without possibility of parole. A new jury must be selected for a new penalty trial. Cal. Penal Code, § 190.4(b); *People v. Thompson*, 50 Cal. 3d 134, 176, 785 P.2d 857, 266 Cal. Rptr. 309 (1990). California's death penalty law expresses no preference as to the appropriate punishment. *People v. Samayoa*, 15 Cal. 4th 795, 852, 938 P.2d 2, 64 Cal. Rptr. 2d 400 (1997).

Douglas presented an alibi defense at the guilt phase and consistently maintained his innocence. Consequently, the attorney presented a lingering doubt defense at penalty but at the same time argued something was not right in Douglas, possibly due to abuse as a child. The Ninth Circuit reversed Douglas' death sentence based on its determination that "'lingering doubt' was not a viable option" once the jury had convicted him on the testimony of his employee.[2] (App. A at 17-18.)

The Ninth Circuit found that psychological and psychiatric testimony at the penalty phase,

> could have invoked sympathy from at least one member of the jury at the penalty phase, particularly when considered in connection with additional sociological history evidence discussed above. [Citation.] Douglas' alibi defense had failed; the jury

---

2. Lingering doubt has "'been recognized as an extremely effective argument for defendants in capital cases.'" *Lockhard v. McCree*, 476 U.S. 162, 181 (1986) [citation]; *accord* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538 (1998); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death, Operative Factors in Ten Florida Death Penalty Cases,* 15 Am. J. Crim. L. 1 (1988).

> had obviously accepted Hernandez's testimony and, particularly in light of the additional penalty phase testimony introduced by the prosecution, "lingering doubt" was not a viable option. [Citation.] Accordingly, there was nothing to lose by presenting Dr. Broussard's testimony about Douglas' mental health.

(App. A at 17-18, emphasis added.)

The Court of Appeals not only re-weighed the evidence, changed the district court's credibility findings and overturned the penalty phase finding that the trial attorney's performance was both deficient and prejudicial, it essentially determined there is only one constitutionally effective way to present penalty evidence and defined *Strickland* prejudice as one potential vote against the death penalty.

The effect of this decision is to require counsel to abandon lingering doubt and present an inconsistent defense at the penalty phase. The Ninth Circuit has basically established what is in effect a per se rule of prejudice whenever potential mitigating evidence is uncovered after trial, because one juror's vote might have been affected.[3]

Moreover, by eviscerating the *Strickland* standard, the Ninth Circuit has created new rules in violation of *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit has thus established both prejudice and performance tests that are fundamentally at odds with *Strickland* and yet will govern all future Ninth Circuit capital cases unless this Court grants certiorari. The Ninth Circuit has established new rules by interpreting *Strickland* prejudice as a reasonable probability

---

3. Judge Kleinfeld expressly observed that the court had created a per se rule of reversal whenever trial counsel had not introduced specific, newly developed evidence at the penalty phase. *See Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (Kleinfeld, J., dissenting).

that one juror might not vote for death, and the performance standard by essentially ruling that there was only one constitutional way to present the penalty: all the mitigation found by habeas counsel.

After boldly stating that "lingering doubt" was no longer a viable option, the Ninth Circuit opines that while the failure to discover "Dr. Broussard [did not impact] . . . the outcome of the guilt phase, the same cannot be said of the penalty phase. . . ." where it might sway one juror. (App. A at 17.) In other words, the Ninth Circuit found prejudice at the penalty phase because one juror might have refused to vote for death in light of the new evidence presented by habeas counsel.

Under this new-evidence-found-by-habeas-counsel "could have invoked sympathy" in one juror prejudice test (App. A at 17), it is hard to imagine any capital case that could not be reversed as to penalty. This cannot possibly be the prejudice required under *Strickland*. This Court faced very similar questions when considering the proper test for "confusing" jury instructions in *Boyde v. California*, 494 U.S. 370 (1989). There, this Court noted that in previous cases "... we made reference both to what a reasonable juror '*could*' have done and what he '*would*' have done. . . . whether there was a '*substantial possibility* that the jury may have rested its verdict on the "improper" ground,'" . . . and how reasonable jurors "*would have*" applied and understood the instructions." *Id.* at 379. It decided in that case that the "proper inquiry" was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380, emphasis added. This Court looked at how Boyde's entire jury would interpret an instruction after observing that:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberation process, with common sense

> understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting. *Boyde v. California,* 494 U.S. at 380-381.

By analogy, the test for *Strickland* prejudice should also be judged by the reasonable likelihood that the entire jury would have voted against the death penalty.

The circuits are split regarding whether *Strickland* prejudice requires a different "result" of the whole jury or a single juror. Although the opinions of this Court speak of a different "result" in the proceedings but for the professional error, result has never been expressly defined. The two cases directly on point go different directions: one requires a different verdict and the other a single juror.

The Fifth Circuit has compared the actual evidence presented at the penalty trial against "all the mitigating evidence contained in the post-conviction record" to see if "there is a reasonable probability at least one juror could reasonably have determined that because of . . . [the defendant's] reduced moral culpability, death was not an appropriate sentence. . ." *Neal v. Puckett*, 239 F.3d 683, 691-92 (5th Cir. 2001).

The Fourth Circuit has stated that "The *Strickland* prejudice standard assumes twelve reasonable, conscientious, impartial jurors. Thus, that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice."[4] (*Williams v. Taylor*, 163 F.3d 860, 868

---

4. It appears that most circuits by implication require a different verdict for a different "result" under *Strickland. Lamb v. Johnson*, 179 F.3d 352, 359 (5th Cir. 1999) ["Had the evidence been presented to the jury, a life sentence would have resulted"]; *Perry v. McCaughtry*, 308 F.3d 682, 689 (7th Cir. 2002) [the state of Wisconsin properly applied *Strickland* when considering "whether the jury could have independently reached the verdict it did . . ."]; *Johnson v. Norris*, 207 F.3d 515, 518-19

(4th Cir. 1998). The court expressly found that a single juror is not the test. It stated that "a court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. *See Strickland*, 466 U.S. at 695, . . . noting that a finding of prejudice does not "'depend on the idiosyncracies of the particular decision maker such as unusual propensities toward harshness or leniency.'" *Ibid.*

A different "result" should require a reasonable probability of a different verdict by the entire jury, not merely the possibility of convincing one juror. Logically, that one juror out of twelve might vote against death does not indicate the result of a defendant's trial is not reliable. Also, a single juror's vote is not a "result." This is especially true in California, where a hung jury results in a new penalty trial, not a different resolution of the proceeding.

The need for this Court to clarify whether a different result means a different verdict or a single juror not voting for death is also most evident in *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998). Thomas claimed an unreasonable investigation because his attorney did not even subpoena his prison and school records "which would have revealed serious psychological problems." *Id.* at 515. The majority decided it was reasonable for the lawyer to place a certain reliance on his client, family and friends, who in Thomas' case denied the existence of psychological problems, so that "the lawyer cannot

---

(8th Cir. 2000) [but for the attorney's "unprofessional behavior, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.]; *More v. Gibson*, 195 F.3d 1152, 1178 (10th Cir. 1999) [ineffective assistance requires a reasonable probability that absent the error the sentencer . . . would have concluded death was not warranted.]; *Duren v. Hopper*, 161 F.3d 655, 664 (11th Cir. 1998) [prejudice requires error that would have ". . . altered the result of the sentencing proceeding"].

be faulted for failing to go down the path thus closed off." *Id.* The dissent, on the other hand, observed that under Illinois law "a defendant cannot receive the death sentence if one juror objects to the imposition of that sentence." Thus, the dissent argued that in Illinois the test for prejudice under *Strickland* ought to be that there is a reasonable probability that, but for counsel's unprofessional error, one juror would have voted against the death penalty. *Id.* at 523.

Further, different panels within the Ninth Circuit seem to address the prejudice aspect of the ineffective assistance of counsel question by different standards. This case was decided on a single juror test, yet other panels require a different verdict. *See Woodford. v. Silva*, 279 F.3d 849 (9th Cir. 2002) [". . . we find that it is reasonably likely that the jury would have concluded that the balance of aggravating and mitigating circumstances would not warrant death." *Strickland*, 466 U.S. at 694, 695]; *Babbitt v. Calderon*, 151 F.3d 1170, 1176 (1998) [". . . the jury would [not] have changed its sentence in light of the new evidence."]

This Court should grant certiorari to decide this important issue because it arises in so many capital cases throughout the nation and the circuits are split on the proper standard.

B. The Reasonableness Of Trial Counsel's Investigation Of Social And Mental History Must Be Judged On The Reasonableness Of What He Did Under The Circumstances, Not What Habeas Counsel Found Or What Should Have Been Done Based On Theories Or Evidence Developed By Habeas Counsel

The Ninth Circuit found Douglas' trial attorney did an inadequate investigation regarding Douglas' mental health and social history. However, the Ninth Circuit did not examine the reasonableness of the investigation done by trial counsel in

1984. Instead, it found ineffective assistance because the attorney should have found the evidence developed by habeas counsel nearly twenty years later, despite the fact that Douglas objected to such investigation and actively threw his attorney off the trail.

Douglas had said one caretaker put him in a closet when going out to drink. Contrary to the conclusion of the Ninth Circuit, that fact did not put the attorney "on notice" or require him to shift focus and present mitigation that was inconsistent with Douglas' persistent and constant claims of innocence. In effect, this case requires a perfect investigation in a capital case without regard to roadblocks put up by the defendant, limited resources, time constraints or the professional judgment of counsel. The Ninth Circuit expressly held, contrary to the district court's findings, that counsel could not rely on the lack of significant findings by the psychiatrist and psychologist he hired to evaluate Douglas before trial nor on Douglas' representations that his life was a "blank." This case was tried in 1984. Penalty trials were very short at that time. *See In re Jesse James Andrews*, 28 Cal. 4th 1234, 52 P.3d 656, 124 Cal. Rptr. 2d 473 (2002); *People v. Andrews*, 49 Cal. 3d 200, 209, 776 P.2d 285, 260 Cal. Rptr. 583 (1989). After taking evidence and evaluating the credibility of the witnesses, the district court denied habeas relief. It found the trial attorney's investigation adequate, especially in view of the fact that Douglas told his attorney he wanted nothing to do with mental health defenses and neither he, his wife nor his son put the trial attorney on notice of any mental illness. Likewise, Douglas obstructed any further investigation of his social history.

Does the Sixth Amendment compel a defense attorney in a capital case to continue investigating the defendant's social-medical history regardless of the information received from the defendant, family members and consulted mental health experts, despite the defendant's opposition and roadblocks? Because a "wide range of reasonable professional conduct" will satisfy the

Strickland standard, 466 U.S. at 689, this Court has "consistently declined to impose mechanical rules on counsel . . ." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). The relevant question is whether trial counsel's decisions were reasonable. *Id.*

This Court recently re-emphasized both the limited nature of habeas review and *Strickland's* caution that a reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission was unreasonable "in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685 ___ (2002).

This Court recently denied certiorari in *Caro v. Woodford*, (*Caro II*) 280 F.3d 1247 (9th Cir. 2002). *Caro v. Calderon (Caro I)* 165 F.3d 1223 (9th Cir. 1999), concluded that trial counsel in a capital case have a duty to consult specific experts in preparation for the penalty phase. Despite having hired four mental health experts, trial counsel were deemed deficient because none of the experts were neurologists or toxicologists. 165 F.3d at 1226. There, as well as in this case, the Court of Appeals based its holding on the fact that federal habeas counsel had later found experts who were willing to opine that Caro suffered brain damage from exposure to toxic pesticides. The Court of Appeals necessarily assumed that trial counsel must have been deficient in not uncovering the same opinions nearly twenty years earlier. It erroneously focused on what could have been found in a perfect investigation 20 years later.

The relevant *Strickland* inquiry is not what could have been pursued in investigation based on what habeas counsel are able to develop many years later, but whether the choices made by trial counsel were reasonable at the time he made them. *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998); *Babbitt v. Calderon*, 151 F.3d at 1175, *cert. denied*, 525 U.S. 1159 (2000).

The opinion in this case completely shifts the focus from the reasonableness of what counsel actually did at the time of trial, under the circumstances counsel had to work with, to what allegedly should have been done based on theories and evidence developed 20 years later.

Babbitt correctly applied *Strickland.* There, the attorney was found constitutionally effective when he did not pursue more mental health investigation because he had spoken with Babbitt, family members and friends and none had reported mental illness. Here, the Ninth Circuit opinion notes that "Douglas was not forthcoming with useful information [but] . . . this does not excuse counsel's obligation to obtain mitigating evidence from other sources. [Citation.]" When it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigation evidence be unearthed for consideration. *Caro I,* 165 F.3d at 1227. This duty to investigate is not limitless . . ." (App. A at 13, citing *Babbitt v. Calderon,* 151 F.3d at 1175, emphasis added.).

While paying lip service to the proposition that the duty to investigate is not limitless, the Ninth Circuit then ignores the fact that counsel in this case, just like counsel in *Babbitt,* had in fact spoken to family members and friends of Douglas without any of them reporting a history of mental illness. In other words, the *Babbitt* panel found counsel to be effective while this panel found Douglas' attorney constitutionally inadequate on essentially the same facts.

In summary, the Ninth Circuit's approach – one based not on what was done but solely on what was developed later – is utterly unfaithful to the reasonableness standard mandated by this Court in *Strickland.*

On appeal, the Ninth Circuit simply reversed the district court's analysis and conclusions. It re-weighed the evidence taken by the district court and reached the opposite conclusions. This remarkable departure from the reasonableness standard of *Strickland* cannot be dismissed as a careless peripheral reference in the majority opinion. Rather, the court

characterized *Caro*'s newly-announced duty to "unearth" all available mitigating evidence as a holding, thereby binding future Ninth Circuit panels which might be confronted with similar issues. *See, e.g., CaroII,* 280 F.3d at 1247, *Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir. 1994).

In the Ninth Circuit's view, the two mental health experts consulted by counsel and numerous lay witnesses interviewed did not satisfy the performance prong of *Strickland* because habeas counsel were able to find more. Of course habeas counsel found more. They had the benefit of hindsight, more resources and no responsibility to fully investigate the crime and victims as well as the countless witnesses Douglas kept insisting would prove his alibi. In short, habeas counsel did not have the time or the financial constraints of the 1984 trial attorney, whose responsibility it was to prepare for both the guilt and penalty phases of Douglas' trial.

The requirement that trial counsel must find all mitigation to avoid being held deficient, as well as the affirmative duty to provide information to mental health experts whether requested or not, place upon trial counsel explicit duties which are inconsistent with this Court's refusal to establish "bright-line" rules of performance. *Roe v. Flores-Ortega*, 528 U.S. at 480.[5/]

---

5. The imposition of these added burdens on trial counsel is also inconsistent with the prevailing understanding of *Strickland*'s teaching. *See, e.g., Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992), *cert. denied* 506 U.S. 958 (1992) [counsel is not obligated to "shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders"]; *Sidebottom v. Delo*, 46 F.3d 744, 754 (8th Cir.), *cert. denied*, 516 U.S. 849 (1995) [same]; *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990) [counsel is not obligated to track down every record that might affect expert diagnosis].

Moreover, the Ninth Circuit applies different performance standards to counsel in the guilt as opposed to the penalty phase of a trial and did so in this case.[6] App. A at 17-18; *compare Caro v. Calderon*, 165 F.3d at 1226-27 and *Caro v. Woodford* 280 F.3d 1247; *see also Silva v. Woodford*, 279 F.3d 825, 843 (9th Cir. 2002); *Wallace v. Stewart*, 184 F.3d 1112, 1116-17 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000). As noted above, this Court determined in *Strickland* that the same test applies to claims of ineffective assistance in both the guilt and penalty phases of a capital case. *See also Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998) [capital defendants faced the same standard for determining prejudice as non-capital defendants].

The higher performance standard and per se deficiency rule imposed in this case by the Ninth Circuit are indefensible under this Court's precedent and also violate *Teague*. The Ninth Circuit's requirement that all possible mental, emotional or background evidence must be found and considered before counsel can make any choices based on tactics, limited resources or case priorities ignores the realities of legal practice and requires perfect penalty investigations and trials rather than fair ones. See also *Kevin Wiggins v. Smith*, 02-311,[7] set for oral argument in this Court on March 24, 2003,

---

6. In a recent non-capital memorandum decision the Ninth Circuit expressly stated that its rejection of ineffective assistance of counsel claims "would probably be different" if the same claims related to the penalty phase of a capital trial. *Easley v. Clarke*, No. 00-16205 (9th Cir. February 21, 2002).

7. *Wiggins* raises a performance issue very similar to this case. In *Wiggins*, as in the case at bench, counsel did investigate, but did not have as detailed or graphic a history as prepared on habeas. However, that is not constitutional deficiency. *See Gilliam v. State*, 331 Md. 651, 680-82, 629 A. 2d 685, 700-02 (1993), *cert. denied*, 510 U.S. 1077 (1994); see

and two other capital cases in which petitions are pending after penalty was reversed for "ineffective" assistance. *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) and *Jennings v. Woodward*, 290 F.3d 1006 (9th Cir. 2002).

Finally, the Ninth Circuit's reversal is premised on the erroneous conclusion that "lingering doubt" is not a viable option once the jury accepted Hernandez's testimony. Nothing supports this conclusion. Hernandez was impeached with prior convictions, longtime drug use and having drugs in the jail. Further, studies indicate lingering doubt is probably the most effective method of avoiding the death penalty. *Tarver v. Hopper,* 169 F.3d 710, 715 (11th Cir. 1999). The choice to use the strategy of lingering doubt must be made by trial counsel, who is in the best position to judge its viability. *See Chandler v. United States*, 218 F.3d 1305, 1361 (11th Cir. 2000) (dissent).

By proceeding as he did, trial counsel also preserved a lingering-doubt defense. "'[R]esidual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) [citation]. Indeed, a comprehensive study of the opinions of jurors in capital cases concluded that "'[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' factor," going on to explain that "the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly

---

also *Burger v.Kemp*, 483 U.S. 776, 788-96 (1987). More important, counsel *does* have leeway in making strategic and tactical decisions about how to present a case at a capital sentencing hearing. Counsel is *not* required to present every conceivable mitigation defense if, after proper investigation and review, he or she concludes that it is not in the defendant's best interest to do so. *See Darden v. Wainwright*, 477 U.S. 168 (1986); *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir.), *cert denied*, 493 U.S. 1011 (1989).

speaking," rather "[t]he best thing [a defendant] can do, all else being equal, is to raise doubt about his guilt." Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1568 (1998) (footnote omitted); *accord* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death, Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988) [stating that "[t]he existence of some degree of doubt about guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied"].

While this is a pre-AEDPA case, it is nevertheless significant that the California Supreme Court had denied habeas corpus of Douglas' claims of ineffective assistance of counsel. Reversing the penalty in this case is the type of overreaching that has led dissenting opinions in other cases to observe: "The panel has given lip service to the statutory habeas standard but hasn't followed it. The opinion gives inadequate deference both to the constitutional analysis of the Court of Appeal of the State of California and to the judgments of defense counsel about how to best argue for his client."[8/] *Gentry v. Roe,* __ F.3d __(9th Cir. 2003), 2003 Daily Journal D.A.R. 1092.

Another dissenting judge observed in a different case that the majority "analyze this case as if they were reviewing a direct appeal of a federal criminal trial, instead of the denial of habeas relief to a state prisoner under section 2254." *Gentry*, at 1275. Indeed, this Court has also observed and reminded the Ninth Circuit that state courts know and follow the law. *Gentry*, at 1257, citing *Woodford v. Visciotti*, __U.S. __, 123 S.Ct. 357,

---

8. Indeed, the dissenting judge pointed out "the panel majority would treat Clarence Darrow's successful closing argument in the Leopold and Loeb case as deficient under *Strickland*, had he lost, because he conceded that his clients were bad people . . ." *Gentry*, 2003 Daily Journal D.A.R. at 1260.

360, 154 L.Ed.2d 279 (2002) and *Early v. Packer*, __ U.S. __, 123 S.Ct. 362, 366, 154 L.Ed.2d 263 (2002).

The State urges this Court to grant certiorari to determine whether counsel must unearth all the evidence developed by habeas counsel to be competent, and whether counsel can render effective assistance by choosing lingering doubt over sympathy. This Court should also determine the Court of Appeals' authority to second-guess trial counsel regarding the efficacy of lingering doubt, twenty years after trial.

Therefore, this Petition should be granted to decide whether prejudice under *Strickland* requires a reasonable probability of a different verdict or merely requires a reasonable probability that a single juror may change his or her vote. The circuit courts are split on this issue and uniformity is required as to the standard they should use.

The Petition should also be granted to determine whether the Sixth Amendment right to counsel requires unearthing "all relevant mitigating information . . . for consideration at the capital sentencing phase" of a trial, (even without the defendant's cooperation) before the attorney may choose the defense to present.

CONCLUSION

Accordingly, respondent respectfully requests that the Petition for Writ of Certiorari be granted.

Dated: March 20, 2003

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

FREDERICK R. MILLAR, JR.
Deputy Attorney General

Pat Zaharopoulos

PAT ZAHAROPOULOS
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

PZ:ab

Supreme Court, U.S.
FILED

021424 MAR 25 2003

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FRED BERRE DOUGLAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPENDIX

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
PAT ZAHAROPOULOS
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2209
Fax: (619) 645-2191
Counsel for Petitioner

13 APP

TABLE OF CONTENTS

Appendix A -
United States Court of Appeals
for the Ninth Circuit, OPINION 1 - 25

Appendix B -
Order Denying Petition
For Writ Of Habeas Corpus 26 - 132

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED BERRE DOUGLAS,	No. 01-99004
Petitioner-Appellant,	D.C. No. CV-91-03055 RSWL
v.	
JEANNE S. WOODFORD, Warden, of California State Prison at San Quentin,	OPINION
Respondent-Appellee.	

Appeal from the United States District Court
for the Central District of California
Ronald S. W. Lew, District Judge, Presiding

Argued and Submitted
September 11, 2002 - Pasadena, California

Filed January 24, 2003

Before: Mary M. Schroeder, Chief Judge,
Michael Daly Hawkins, and William A. Fletcher,
Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Mark A. Borenstein, Shapiro, Borenstein & Dupont, Santa Monica, California, for the petitioner-appellant.

Pat Zaharopoulos, Office of the Attorney General for the State of California, San Diego, California, for the respondent-appellee.

OPINION

HAWKINS, Circuit Judge:

Fred Douglas, a California death row inmate, appeals from the denial of his petition for a writ of habeas corpus. Because we find that Douglas's counsel was constitutionally ineffective in failing to investigate and present significant mitigating evidence to the jury , we grant relief as to the penalty phase, but deny all his other claims.

FACTUAL AND PROCEDURAL BACKGROUND

In 1984, Douglas was convicted in California state court of the 1982 murders of two teenage girls, Beth Jones and Peggy Krueger. The case against Douglas was based primarily on the immunized testimony of his accomplice, Richard Hernandez, whose testimony was substantially corroborated by other witnesses.

Douglas was linked to the missing girls by Dana Lee, who testified he had met Douglas about a month before the mur ders. Douglas had asked if Lee knew of any women who would pose for nude photographs. Lee introduced Douglas to Krueger, who in turn introduced Douglas to Jones. The girls told Lee and their roommate, Terry Allmon, that they planned to pose nude for money. Allmon testified that Jones told her if she wasn't back

by noon the next day, "something was wrong." When Jones did not return, Allmon notified the girl's mother.

Hernandez's testimony supplied most of the details about the murders. Hernandez had been working in Douglas's furniture refinishing shop, and was paid in food, beer, lodging and occasional spending money. According to Hernandez, he and Douglas drove Krueger and Jones to the desert near Indio. Douglas told Hernandez to lay a sheet on the ground and prepare drinks for the four of them. An hour later, Douglas instructed the victims to remove their clothing. When Krueger asked to see the money, Douglas showed her a $100 bill. Douglas then instructed Hernandez to tie the victims' feet and hands and retrieved a rifle from his car, telling them "here is the camera." He ordered them to make love to each other and for ten to fifteen minutes paced back and forth shouting orders at the victims.

Douglas cut Krueger on the neck with a razor blade and sucked on the wound for about ten minutes. He then retrieved a beer and told Hernandez the women "just couldn't go back." Douglas instructed the victims to orally copulate him. At this point, Hernandez claims he briefly left the scene. When he returned, he saw Douglas choking Jones. Hernandez said Krueger appeared dead and blood was spurting from her mouth. Hernandez claims he tried to stop Douglas, but Douglas knocked him down and Hernandez was too intoxicated to stop him. After choking Jones, Douglas struck her in the neck with the rifle.

Douglas and Hernandez went to a nearby bar for a drink and then returned to the murder scene. Douglas ordered Hernandez to bury the bodies and left for an hour. When Douglas returned, they dumped the victims' clothing and drove back to Douglas's business, where they burned the victims' identification.

Hernandez and Douglas were questioned by police shortly after the murders. Both gave an alibi Douglas had concocted before the crime about spending the day fishing in Oceanside. The two left for Canada that evening. About six weeks later, they drove to Nevada and changed license plates, then drove to the murder site to check the graves. Toward the end of 1982, the men returned to Canada, and then Douglas left without telling Hernandez where he was going.

The girls' bodies were discovered in 1983. Hernandez had by this time returned to Orange County. Upon learning of the discovery and that there were warrants for their arrest, Hernandez and Douglas fled to Mexico. Douglas left three weeks later, but Hernandez remained for nearly ten months until he was taken into custody by Mexican authorities on different charges. Before speaking to American authorities, Hernandez was beaten by Mexican officers and ultimately confessed to his role in the murders. Douglas was arrested in Las Vegas in February 1984, waived extradition and was returned to California.

At the guilt phase of Douglas's trial, the State corroborated Hernandez's description of events with testimony about a similar incident with Douglas a few years prior to the crime. Kathy Phillips testified that she was a friend of Hernandez, who often supplied her with drugs and lived next door to Douglas's furniture refinishing shop. Hernandez introduced Phillips to Douglas in 1979. Douglas told her he would pay her if she posed nude for photographs while in bondage. She agreed, and Douglas took her to his shop, tied her hands and ankles, and gagged her mouth. He showed her photos of several other women to indicate how he wanted her to pose. He told her to "look scared," but did not harm her.

Phillips went on to describe how, two weeks later, Douglas asked her if she would assist him in killing young women in the

desert while making sex films that included bondage and sadism. Douglas apparently believed having a woman present would make it easier for the victims to trust him. Phillips testified that Douglas told her that his plan was to bury the bodies to eliminate any evidence and that they could make a lot of money selling the films to "people in Las Vegas." Phillips refused to participate in the scheme, but did not go to the police because of her drug habit. Her contact with Douglas ended when she was convicted of burglary and sentenced to jail.

Douglas presented an alibi defense. Douglas's long-time friend, Henry Akers, testified that on the morning of the murders he had spoken to Douglas at the same time Hernandez claimed he and Douglas were driving to the desert with the victims. This story was consistent with the one given by Akers to police at the beginning of their investigation, but was substantially impeached during the prosecution' s rebuttal.

Douglas also called an acquaintance of Krueger's who testified she saw what she thought were the victims at a mall a month after the date of the murders. Krueger's boyfriend testified that he believed Krueger had left on the day of the murders to visit friends, and that after Krueger's disappearance he had confronted Lee about a man named "Doug," whom Dana Lee described as having an appearance that differed from Douglas's.

The jury convicted Douglas of first degree murder and found the special circumstance of multiple murder, making him death eligible. At the penalty phase, Julia McGettrick and Vickie Pendleton testified of separate incidents in 1976 in which Douglas forced or frightened them into posing for nude photographs or performing sex acts in the desert. A third woman, Pamela Williams, testified that in 1977 Douglas had picked her up hitchhiking and sought her participation in a plan to make movies involving the torture and killing of young

women. Douglas was charged with attempted murder and other crimes arising out of this plan, and, after the jury deadlocked, eventually pled nolo contendere to solicitation to commit a felony.

In mitigation, the defense introduced testimony by Douglas's wife, son, a friend and a neighbor. The witnesses testified generally about Douglas's good character, nonviolent nature, generosity and difficult background as an orphan. The jury returned a verdict of death, and the trial judge confirmed the sentence.

Douglas's convictions and sentence were upheld on direct appeal. He filed for federal habeas relief in 1992. Federal proceedings were stayed while Douglas exhausted several claims in state court. The district court granted an evidentiary hearing on some claims, including Douglas's claim of ineffective assistance of counsel, and then ordered briefing on all the claims in the petition. The district court ultimately denied Douglas's petition in November 2000, but granted a Certificate of Appealability ("COA") as to two issues, involving ineffective assistance of counsel. Douglas's motion to broaden the COA was granted in part by this court, adding additional claims concerning the admission of Hernandez's testimony, Douglas' s competence to stand trial, and improper argument by the State during the penalty phase closing argument.

STANDARD OF REVIEW

Douglas's federal habeas petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Accordingly, pre-AEDPA standards apply to his claims. *Lindh v. Murphy,* 521 U.S. 320, 322-23 (1997). The district court's decision to grant or deny a 28 U.S.C. § 2254 petition is reviewed de novo. *Bean v. Calderon,* 163 F.3d 1073, 1077 (9th Cir. 1998). The district court's refusal to hold an

evidentiary hearing is reviewed for abuse of discretion. *Caro v. Calderon,* 165 F.3d 1223, 1225-26 (9th Cir. 1999).

DISCUSSION

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Douglas alleges that his trial counsel was ineffective because he failed to investigate and develop a mental health defense at the guilt phase and because he failed to introduce mental health and social background evidence in mitigation at the penalty phase of the trial. We review Douglas's claim according to the familiar standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Douglas must prove that his counsel' s performance was deficient and that it prejudiced the outcome of his trial. *Id.* at 689, 694. "Whether a defendant received ineffective assistance of counsel is a legal question reviewed de novo." *Smith v. Ylst,* 826 F.2d 872, 875 (9th Cir. 1987).

A. *Guilt Phase - Mental Health Investigation*

[I] Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired. *See Bean,* 163 F.3d at 1078. In this case, Douglas's trial counsel, George Peters, recognized that a psychiatric defense might be an option. Early in the case, he had a psychiatrist, Dr. Sharma, and a psychologist, Dr. Rogers, appointed to help. At the time, Douglas was experiencing severe claustrophobia in his jail cell, a problem apparently related to having been locked in a closet by abusive adoptive parents as a child. Because Douglas was focused on his claustrophobia, Peters had a difficult time getting him to concentrate on his defense, and initially engaged the mental health experts to assist in this problem, in particular, by asking them to try to get an individual cell for Douglas.

Although Peters directed the experts to focus primarily on the claustrophobia issue, he testified that he also instructed them to see if there was anything of a psychological nature that could be useful in the defense. Each doctor performed some brief interviews and testing, and found no indications of any major mental disorders. Dr. Rogers did suggest that additional testing could be done, and Peters requested and received $35,000 for additional mental health testing.

Further tests, however, were never performed. Douglas received a private cell at the jail and, as the district court found, then refused any further cooperation in mental health testing. This finding is not clearly erroneous. There was substantial testimony from Peters that although he broached the subject with Douglas several times, Douglas was adamant that he did not want any psychological issues introduced at trial, that he was innocent and that he wanted to use an alibi defense. Douglas' s attitude was corroborated by one of the investigators Peters had hired to help with the case.[1/] While Douglas was willing initially to consult with the doctors, there is no indication he was willing to do so *after* receiving his own cell. Strikingly absent is any testimony by Douglas to the contrary .On these facts, we cannot say the district court clearly erred when it determined that Douglas would not submit to further psychological testing. Therefore, Peters did not err by failing to obtain further testing, as Peters could not secure such testing without his client's cooperation[2/]

---

1. Peters had two investigators appointed who were very experienced with complex criminal cases. One investigator died prior to Douglas's habeas proceeding.

2. Because of this conclusion, we do not consider for prejudice purposes the testimony Douglas introduced from various experts at the evidentiary hearing, but only the

This conclusion does not, however, as the State would have it, absolve Peters of all responsibility for further investigation into a mental health defense. Indeed, as we recently explained, "if a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial." *Silva v. Woodford,* 279 F.3d 825, 847 (9th Cir.), *cert. denied,* 123 S. Ct. 342 (2002); *see also Agan v. Singletary,* 12 F.3d 1012, 1018 (llth Cir. 1994) ("An attorney cannot blindly follow a client's demand that his [mental state] not be challenged . . . and end [ ] further inquiry regarding [the defendant's] mental fitness when [the defendant] refused to submit to psychiatric examination.").

In this case, as it turns out, there was a significant alternative source of information that was readily discoverable. Although Peters ordered and reviewed the file pertaining to Douglas's 1977 offense, he failed to discover an order contained in that file directing Dr. Louis Broussard to administer a psychological examination to Douglas. Based on his 1977 interview and testing with Douglas, Dr. Broussard concluded that Douglas was suffering from "serious and outstanding mental illness and possible organic impairment." He found that Douglas was confused, his thought processes chaotic, and that he suffered from severe paranoia. Dr. Broussard believed his test results indicated "some level of pre-existing neurological deficit," which may have interacted with brain damage later in life stemming from Douglas's chronic alcoholism, constant exposure to toxic solvents in connection with his furniture refinishing business, and a serious head injury sustained in an automobile accident in 1967. Based on his observations, Dr.

---

information Peters could have obtained without Douglas's cooperation.

Broussard had informed Douglas's attorney in 1977 of his opinion that: (I) Douglas might not be competent to stand trial; and (2) it was reasonably certain Douglas did not have the capacity to plan and execute the actions with which he had been charged.

[2] Peters admits that he learned of Dr. Broussard for the first time during the habeas proceedings. Peters also testified that he "would have loved to have" had the mental health information Dr. Broussard developed for use during the trial. Even the State concedes that it was professional error not to discover Dr. Broussard.[3] We therefore agree with Douglas that Peters's investigation of his mental health was deficient.

B. *Guilt Phase Prejudice*

Notwithstanding the inadequacy of Peters's mental health investigation, Douglas cannot succeed on his claim unless he demonstrates a "reasonable probability" that the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694. With respect to the guilt phase, Douglas has not borne this burden.

[3] To establish a legal defense to first degree murder, Douglas would have had to prove that he lacked the ability to premeditate and deliberate. At the evidentiary hearing, Dr. Broussard testified that Douglas's mental state in 1977 was like that of a long-term institutionalized patient and that Douglas would be unable to function in society Dr. Broussard's opinion on Douglas's ability to premeditate was questioned by the

---

3. Dr. Broussard maintained an office in Orange County at the time of Douglas's trial and his phone number was listed in the phone book. Thus, had Peters noticed the order in the 1977 file, it would have been easy to contact Dr. Broussard.

district court, which gave it "little weight" because Dr. Broussard's impressions of Douglas's abilities were contradicted by objective evidence that Douglas had been running his own furniture refinishing shop and two bars, things Dr. Broussard testified Douglas simply could not be doing.

[4] In contrast, the State's evidence overwhelmingly pointed to premeditation and deliberation. Phillips testified that Douglas had taken photographs of her in bondage and asked her to participate in a murder plot two years before the murders. Lee testified that Douglas had asked him if he knew of any young girls who would be photographed nude. Hernandez testified that Douglas had picked out a remote spot in the desert ahead of time, created an alibi for them in advance (and then gave police that story when questioned), and that Douglas packed a rope, a gun and a shovel for the trip to the desert. In light of this substantial evidence, we conclude that it is not reasonably probable that the jury would have accepted Dr. Broussard's testimony that Douglas lacked the ability to premeditate and deliberate the murders. We therefore agree with the district court that Douglas did not establish prejudice at the guilt phase.

C. *Penalty Phase - Social Background Investigation*

In addition to the inadequate mental health investigation, Douglas also contends that Peters conducted an inadequate investigation into his social history and failed to prepare witnesses adequately for the penalty phase of the trial. Douglas again was less than helpful. When asked about his childhood, Douglas reported that his parents were dead and that his past was a "blank." According to one investigator, Douglas would not provide the names of relatives or friends regarding childhood abuse. The investigators thus pursued other avenues, including interviewing Douglas's wife, son, friends and neighbors. Peters spent virtually no time preparing these

witnesses for their testimony at the penalty phase. Douglas's wife asserts that she did not even know she would be testifying until the night before the penalty phase began.

The mitigation evidence presented was minimal. Two witnesses testified that Douglas had an aversion to the sight of blood and several testified as to his nonviolent nature, in an apparent attempt to focus on "lingering doubt" of whether Hernandez's story was completely true. Against Douglas's wishes, Peters did introduce some sociological history. His family members testified in very general terms that Douglas had been orphaned and had a difficult childhood, running away from home at fifteen to join the Marines. They also indicated that Douglas was very poor growing up and always kept large quantities of food in his home, apparently as a result of this childhood deprivation.

In his closing, Peters argued that these factors may have created a "demon" within Douglas that had finally surfaced after years and years of a normal life. Peters attested during the habeas proceedings that at the time he was making the closing argument, he was afraid Douglas was going to "leap out and grab me around the throat" for disregarding his wishes.

Douglas contends here that much more information should have been discovered and presented at the penalty phase. At the evidentiary hearing, he presented detailed testimony of a difficult childhood. Douglas was abandoned as a child and raised by foster parents, including an abusive alcoholic foster father who locked him in a closet for long periods of time. He grew up in an extremely poor Chicago neighborhood where children had to scavenge for food in garbage cans and often ate lard or ketchup sandwiches. After running away at the age of fifteen to join the Marines, Douglas was arrested and put in a Florida jail where he was beaten and gang-raped by other inmates.

Additional character evidence was also available. In the Marines, Douglas earned a number of medals and commendations and also helped rescue two drowning sailors. Another witness testified that Douglas had been very helpful to her during her pregnancy and marital difficulties.

Finally, Douglas presented additional evidence of possible brain damage. After the military, Douglas began working in furniture refinishing and was exposed to toxic solvents daily. In 1967, Douglas was involved in a serious auto accident and suffered a concussion and damage to his left temporal lobe. He also consumed a great deal of alcohol on a daily basis from 1966 to 1977.

[5] We first consider whether Peters's investigation of Douglas's social history was inadequate. Douglas was not forthcoming with useful information, but, as noted above, this does not excuse counsel's obligation to obtain mitigating evidence from other sources. *Silva,* 279 F.3d at 846-47. When it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigation information be unearthed for consideration." *Caro,* 165 F.3d at 1227. This duty to investigate is not limitless, however; "it does not necessarily require that every conceivable witness be interviewed." *Hendricks v. Calderon,* 70 F.3d 1032, 1040 (9th Cir. 1995). For example, in *Babbit v. Calderon,* we found that counsel was not ineffective for failing to uncover a family history of mental illness where counsel' s investigators spoke with family members and friends who might have had such information, but none of them reported any history of illness. 151 F .3d 1170, 1174 (9th Cir. 1998).

[6] "[C]ounsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Id.* (internal quotation and citation omitted). In this case, however,

the initial investigation *did* put counsel on notice that Douglas had a particularly difficult childhood, yet there was no attempt to contact persons who might have had more detailed information about Douglas's past. Peters's failure to prepare the witnesses adequately for testimony at the penalty phase also meant that the testimony that was introduced was less than compelling. Indeed, even though Peters knew that Douglas had spent a great deal of time locked in a closet, a factor which contributed to his severe claustrophobia, Peters did not elicit any testimony regarding this fact from Douglas's family.

[7] It was also easy to ascertain that Douglas's line of work exposed him to toxic solvents, yet Peters did not investigate the effects of this exposure or inform the mental health experts who examined Douglas of this fact. *See Caro v. Woodford,* 280 F.3d 1247, 1254-56 (9th Cir.), *cert. denied* 122 S.Ct. 2645 (2002) (finding counsel ineffective for failing to investigate effects of long term exposure to neurotoxicants). Evidence regarding a serious head injury in a 1967 automobile accident could have been detected from medical records or from Dr. Broussard (had he been discovered). In sum, although Peters did perform some investigation, it was constitutionally inadequate. The information Peters did obtain about Douglas's troubled childhood revealed the need to dig deeper, and he did not adequately prepare the witnesses in order to present the material he did gather to the jury in a sufficiently detailed and sympathetic manner. We therefore conclude that Peters's investigation and presentation of social history at the penalty stage was deficient.

D. *Penalty Phase - Prejudice*

Having found that Peters did not conduct an adequate investigation into Douglas's mental health or social background, we consider whether it is reasonably probable that this additional evidence could have affected the outcome of the

penalty phase. As a preliminary matter, we recognize that in some recent cases when a defendant has insisted that mitigating evidence not be presented, we have analyzed prejudice in terms of whether the additional evidence would have changed the defendant's mind. *See, e.g., Hayes v. Woodford,* 301 F.3d 1054, 1070 (9th Cir. 2002); *Landrigan v. Stewart,* 272 F.3d 1221, 1228 (9th Cir. 2001). We do not believe such a test is applicable in the case here, in which counsel actually disregarded his client's wishes and did put on what mitigating evidence he had unearthed. Thus, in this case, it was not the client's desires which impeded Peters's efforts, but rather, Peters's failure to uncover the additional evidence that creates the problem.

We also note that even when we have placed emphasis on the client's desires, we have required that the client make an "informed and knowing" decision not to present mitigating evidence. *Jeffries v. Blodgett,* 5 F.3d 1180, 1193 (9th Cir. 1993); *see also Silva,* 279 F.3d at 847 (holding that counsel has duty to "try to educate or dissuade" the defendant about the consequences of actions). It is, of course, difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists. *See Landrigan,* 272 F.3d at 1228 ("[I]f the investigation had been more thorough, [defendant] would have had more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented.").

[8] Moreover, we have been careful to note that although the client's desires are not to be ignored altogether, it may be inappropriate for counsel to acquiesce to the client's demands. As we recently held in *Williams v. Woodford,* counsel "cannot be faulted for deferring to the defendant's desire to forgo presentation of mitigating evidence *when the defendant's wish coincides with counsel's reasonable professional judgment that no mitigating evidence be introduced.*" 306 F.3d 665,720 (9th

Cir. 2002) (emphasis added); *see also Campbell v. Kincheloe,* 829 F.2d 1453, 1462 n.5 (9th Cir. 1987) (holding counsel not ineffective for adhering to a client's desire not to present evidence when counsel had legitimate strategic reasons for not presenting the evidence). "[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle,* 21 F.3d 1446, 1456-57 (9th Cir. 1994) (emphasis omitted); *see also Jennings v. Woodford,* 290 F.3d 1006, 1014 (9th Cir. 2002) ("[A]ttomeys have considerable latitude to make strategic decisions . . . *once they have gathered sufficient evidence upon which to base their tactical choices.")* (emphasis in original). Instead, as in *Silva,* Peters "could not make a reasoned tactical decision about the trial precisely because 'counsel did not even know what evidence was available.' "279 F.3d at 847 (quoting *Deutscher v. Whit ley,* 884 F.2d 1152, 1160 (9th Cir. 1989)). As a result, neither Douglas nor Peters made a fully informed decision not to present the evidence to the jury.[4/]

Turning to a more traditional prejudice analysis, we consider whether there is a reasonable probability that the additional evidence that Peters should have discovered would have altered the outcome of the penalty phase. *See Strickland,* 466 U.S. at 687. Evidence regarding social background and mental health is significant, as there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California,* 494 U.S. 370, 382

---

4. This case also amply illustrates the need for counsel to discover and independently evaluate the potential evidence, as a person with a mental disorder may be reluctant to recognize his own problems. *See Bundy v. Duger,* 816 F.2d 564,566-67 n.2 (llth Cir. 1987).

(1990) (internal quotation marks and emphasis omitted).

The available mitigating evidence that could have been introduced in Douglas's trial was precisely the type of evidence that we have found critical for a jury to consider when deciding whether to impose a death sentence. *Ainsworth v. Woodford*, 268 F.3d 868, 875 (9th Cir. 2001) (holding that available evidence would have provided the jury insight into the defendant's troubled childhood, history of substance abuse and mental and emotional problems). Although Peters introduced some of Douglas's social history, he did so in a cursory manner that was not particularly useful or compelling. *See id.* at 874 ("While it is true that the testimony touched upon general areas of mitigation, counsel's cursory examination of the witnesses failed to adduce any substantive evidence in mitigation."). Peters's argument that Douglas's life had created a "demon" within him lacked force without some expert testimony to back it up. *See Caro*, 165 F.3d at 1227 (holding that the jury did not "have the benefit of expert testimony to explain the ramifications of these experiences on [defendant's] behavior").

Although we did not find that Peters's failure to discover Dr. Broussard impacted the outcome of the guilt phase, the same cannot be said of the penalty phase. Even if the testimony were not enough to negate an element of underlying offense, it could have invoked sympathy from at least one member of the jury at the penalty phase, particularly when considered in connection with additional sociological history evidence discussed above. *See Hendrick*, 70 F.3d at 1044 (holding that mental health evidence could be mitigating at the penalty phase "even though it is insufficient to establish a legal defense to conviction in the guilt phase"). Douglas's alibi defense had failed; the jury had obviously accepted Hernandez's testimony and, particularly in light of the additional penalty phase testimony introduced by the prosecution, "lingering doubt" was not a viable option. *Cf Williams*, 306 F.3d at 715 (holding

counsel was not ineffective for failing to present mental health evidence where lingering doubt was a viable strategy). Accordingly, there was nothing to lose by presenting Dr. Broussard's testimony about Douglas's mental health.

Dr. Broussard could have also presented significant testimony regarding Douglas's performance on a variety of psychological tests which, in Dr. Broussard's opinion, revealed a "serious and outstanding mental illness." Even without conducting a contemporaneous interview of Douglas, Dr. Broussard opined during the habeas proceedings "to a reasonable degree of scientific certainty" that the results of a 1983 or 1984 examination "would have also revealed significant mental illness and dysfunction." Dr. Broussard could have also provided a valuable explanation of other mitigating evidence by explaining how the effects of the solvents and the automobile accident may have exacerbated Douglas's pre-existing neurological deficit.

[9] The gruesome nature of the killing did not necessarily mean the death penalty was unavoidable. *See Smith v. Stewart,* 189 F.3d 1004, 1013 (9th Cir. 1999) ("[T]he horrific nature of the crimes involved here does not cause us to find an absence of prejudice."); *Hendricks,* 70 F.3d at 1044 (holding that despite the substantial evidence of aggravation, failure to present mitigating evidence was prejudicial). The jury did not hear a substantial amount of Douglas's social history and there was a total absence of evidence regarding Douglas' s mental problems. The jury's failure to consider this compelling evidence "undermine[s] [our] confidence in the outcome" of Douglas's penalty phase hearing. *Strickland,* 466 U.S. at 694. Douglas has thus established that Peters's deficient performance was prejudicial and the writ should be granted with respect to Douglas's sentence. Because of our decision on this issue, we do not reach the additional claims affecting the penalty phase of his trial, and consider only Douglas's remaining claims affecting

the guilt phase.

II. HERNANDEZ'S TESTIMONY

A. *Facts*

Hernandez was initially arrested in Mexico in 1984. Mexican officials informed the Anaheim Police Department of the arrest, and several California officers traveled to Mexico to bring Hernandez back. The officers informed the local Mexican police of the murders, showed them the arrest warrant and provided them some photographs. The Mexican officers allowed as how they intended to question Hernandez and borrowed a tape recorder from the Americans, but the American officers were not invited to attend the interrogation. During the interrogation that followed, Hernandez claims he was beaten for fifteen or twenty minutes, but still did not talk. The police then stopped the questioning, but informed Hernandez he could expect worse treatment that evening. They returned later and told Hernandez they were going to "take him out to the beach." Hernandez construed this to mean that he would be taken to the beach and killed. Fearing for his life, Hernandez gave a full confession. His statement was typed and signed, and he was told it would not be given to the California officials.

Mexican police then released Hernandez to California authorities, giving them a copy of the statement. Hernandez was escorted across the border and officially arrested. Before his arraignment, he was interviewed at the police station by Deputy District Attorney Rackacaus, who did not give Hernandez a *Miranda* warning. Rackacaus told Hernandez their discussion was "off the record," that Hernandez was in "serious trouble" and that he wanted to know Hernandez's story to see if he could be used as a witness against Douglas. Hernandez agreed to tell his story, though he did not want it taped.

During the interview, Rackacaus did not mention the Mexican confession. Although Hernandez says he suspected the American police were given the statement, he did not know if this were true. During the interview, Hernandez's counsel arrived at the station, and although Hernandez was informed of this fact, he indicated he would finish giving his statement before speaking to counsel. Hernandez subsequently testified that his statements to Rackacaus were made freely and voluntarily. By his own account, any remaining threat of beating disappeared once he crossed the border, testifying that he "knew [he] wasn't going to get beat up or forced to say anything [he] didn't want to."

A few weeks after the interview, following negotiations between the prosecution and Hernandez's counsel, Hernandez was granted full immunity in exchange for his testimony against Douglas. No conditions were placed on the grant and he was not required to testify in conformity with his earlier representations. He was, however, informed that he could be prosecuted for perjury if he testified untruthfully.

B. *Due Process Violation*

Douglas contends that Hernandez's trial testimony violated his due process rights because Hernandez's testimony was involuntary as a direct product of the coerced Mexican confession and because American authorities aided and abetted the procuring of the confession and then exploited its results. In general, Douglas does not have standing to challenge a violation of Hernandez's rights; however, illegally obtained confessions may be less reliable than voluntary ones, and thus using a coerced confession at another's trial can violate due process. *See Clanton v. Cooper,* 129 F.3d 1147, 1157-58 (10th Cir. 1997); *United States v. Mattison,* 437 F.2d 84, 85 (9th Cir. 1970). Because the confessions themselves were not introduced at Douglas's trial, however, he must show that Hernandez's *trial*

testimony was involuntary. *Mattison*, 437 F.2d at 85.

Douglas essentially argues that the "taint" of the beatings in Mexico carried over to trial, relying on a number of cases in which the government sought to introduce purportedly voluntary confessions that followed an initial confession obtained in violation of an accused's constitutional rights. *See, e.g., United States v. Jenkins*, 938 F.2d 934,941 (9th Cir. 1991) (holding that amount of time elapsed and "purpose and flagrancy" of misconduct are considerations in whether taint of coerced confession has dissipated).[5] The district court correctly recognized that our decision in *Mattison* is more analogous, as it actually involved a witness's live trial testimony after an earlier involuntary confession by that witness. In *Mattison*, as here, the defendant argued that the witness's trial testimony was so tainted by the illegal confession that it rendered the trial fundamentally unfair. 437 F.2d at 85. We disagreed, stating that "[B]y the time of trial, the psychologically coercive atmosphere of that interrogation must surely have dissipated. There is no indication that [the witness] was told at any time by anyone what he should say on the witness stand." *Id.* We also noted that, in contrast to introducing an out-of-court statement, the witness's testimony was subject to cross-examination and

---

5. As part of this overall claim, Douglas also argues that the role of the United States officers in the Mexican confession contributed to the involuntariness of Hernandez's trial testimony. The record, however, reflects that the alleged participation in the coerced Mexican confession appears to be somewhat limited: the American officers showed the Mexican officers photographs and an affidavit in support of the warrant for Hernandez's arrest, accompanied them on a warrantless search of Hernandez's local residence and supplied a tape recorder to the Mexican officials upon request.

the jury could observe demeanor and gauge credibility and decide what weight to afford the testimony. *Id.* In this case, Hernandez himself acknowledged that the coercive nature of the Mexican interrogation changed once he crossed the border, where he knew he would not be beaten or told what to say. The American authorities did not utilize the Mexican confession in any way against Hernandez, nor was it introduced at Douglas's trial. *See id.* Having negotiated complete immunity, the prosecution had nothing to hold over Hernandez at the time he testified. He was not told what to say at Douglas's trial, other than to "tell the truth." He was cross-examined and the jury had the opportunity to observe his credibility.

While true that the "purpose and flagrancy" of the misconduct is to be considered relevant in determining whether the taint of an involuntary confession has dissipated, it is hard to say that the American officers' "participation" in the Mexican confession was particularly flagrant, and it did not make it any more likely that Hernandez's later trial testimony was involuntary. On these facts and in line with *Mattison,* the district court correctly concluded that even though the earlier confessions were involuntary or in violation of Hernandez's constitutional rights, his testimony at Douglas's trial was not coerced and did not violate Douglas's due process rights.

C. *Failure To Disclose Mexican Reports*

In a somewhat related claim, Douglas alleges that the prosecution failed to provide the defense with reports from Mexican authorities concerning their interrogations of Hernandez. Douglas claims that the reports would have established a link between American officials and the Mexican interrogation, and that the district court abused its discretion by denying an evidentiary hearing on this matter.

The State, on the other hand, claims that it never had the

interrogation tape or signed confession, and that Detective Martinez was given only a typed report in Spanish. (Martinez testified at the state court hearing that Mexican authorities did not give them the tape, but gave them a typed report instead.) The State also asserts that this was obviously turned over to the defense, because Peters cross-examined Hernandez in detail about his statements to the Mexican police and their interrogation methods.

An evidentiary hearing is required where "the petitioner's allegations, if proved, would establish the right to relief." *Silva*, 279 F.3d at 833 (internal quotation marks omitted). In this case, Douglas has not alleged any additional facts that would be borne out by disclosure of the tapes. He contends only generally that the tape and reports would have shown the United States officers' "involvement" in the Mexican interrogation. He does not explain how the information would be materially different from the information developed in state court. The American officers were questioned at the pre-trial state court hearing regarding their role in the Mexican interrogation. Douglas's counsel also cross-examined Hernandez in front of the jury about the Mexican confession. Even assuming the state had the reports (which is contradicted by the record), Douglas cannot establish that he was prejudiced by the failure to produce these reports.

III. COMPETENCY

Douglas contends that the district court abused its discretion by failing to hold an evidentiary hearing with respect to his competency at the time of his trial in 1984 and that the facts were not sufficiently developed for the court to rule on this claim.

To be competent to stand trial, a defendant must demonstrate an ability "to consult with his lawyer with a

reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Godinez v. Moran,* 509 U.S. 389,396 (1993) (internal quotations and citation omitted). In order to be entitled to an evidentiary hearing on a claim of actual incompetency, the defendant must raise a "real and substantial" doubt as to his competency, even if those facts were not presented to the trial court. *Boag v. Raines,* 769 F.2d 1341, 1343 (9th Cir. 1985).

Douglas' s incompetency claim is based principally on the 1977 evaluation by Dr. Broussard, who had determined Douglas was not competent to stand trial in 1977, and the opinion of Dr. Rosenberg, who examined Douglas in 1997. Both doctors testified that they believed Douglas was also incompetent at the time of the trial in 1984. The district court found that these opinions did not suffice to raise a "real and substantial" doubt as to Douglas's competence in 1984 in light of other contemporaneous and objective indications of competence.

Specifically, Douglas's trial attorney testified that he spent a considerable amount of time with Douglas preparing for trial and that he had absolutely no doubt that Douglas understood the charges against him and was able to assist in his defense. Dr. Rogers, the psychologist who examined Douglas in 1984, was not specifically requested to prepare a formal opinion on competence, but verbally discussed Douglas's condition with Peters and told him that she believed Douglas was competent. Douglas did not exhibit any strange behavior in the courtroom, nor did the prosecutor or trial judge express any concerns about his competence. *See Hernandez v. Ylst,* 930 F.2d 714, 718 (9th Cir. 1991) (finding it significant that neither trial judge, government counselor defense attorney questioned defendant's competence).

Finally, perhaps the most convincing evidence of Douglas's competence in 1984 is the clerk's transcript of the hearing on

Douglas's motion for substitute counsel pursuant to *People v. Marsden*, 2 Cal.3d 118 (1970). Following the jury verdict at the guilt phase, Douglas filed a declaration in support of a *Marsden* hearing, complaining of various disagreements with Peters during the trial. The trial court held a hearing and discussed the complaints with both Peters and Douglas. Douglas was coherent, responsive and quite articulate throughout the proceeding. The transcript makes it quite clear that Douglas understood the charges against him, including the significance of the upcoming penalty phase and that he had paid close attention throughout the guilt phase. Like the district court, we find this transcript to be strong evidence that Douglas was competent at the time of his trial in 1984.

The district court correctly concluded that Douglas did not raise a "real and substantial" question about his competence to stand trial and was not entitled to habeas relief on this claim.

CONCLUSION

[10] The district court properly denied the writ with respect to Douglas's guilt phase claims regarding competence, ineffective assistance of counsel, and the admission of the Hernandez testimony. Because the failure to adequately investigate Douglas's social history and mental health was prejudicial during the penalty phase, we remand the case to the district court with instructions to grant the petition for a writ of habeas corpus unless the State within a reasonable period of time either grants a new penalty phase trial or vacates the sentence and imposes a lesser sentence consistent with law.

AFFIRMED IN PART; REVERSED IN PART; PETITION GRANTED AS TO SENTENCE AND REMANDED TO DISTRICT COURT WITH INSTRUCTIONS.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS CASE NO. CV91-3055 RSWL

Petitioner, ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

v.

ARTHUR CALDERON,
Warden of California State
Prison at San Quentin,

Respondent DEATH PENALTY

I. INTRODUCTION

Petitioner Fred Berre Douglas tiled a petition for writ of habeas corpus in federal court challenging his convictions in Orange County on two counts of first degree murder and his death sentence.

Douglas claims various constitutional errors infected either the guilt or penalty phase of his trial. He argues that these errors require the Court to reverse his convictions, his sentence, or both.

The Court has thoroughly examined each issue raised and finds that Douglas has not established that he is entitled to relief on any claim in the petition. Accordingly, the Court DENIES the petition for writ of habeas corpus.

II. BACKGROUND

A. Factual Background

Douglas was convicted in 1984 of the 1982 murders of two teenage girls -- Beth Jones and Peggy Krueger. The jury found true the special circumstance of multiple murder. After a penalty phase trial,Douglas was sentenced to death.

1. Guilt Phase

Richard Hernandez, who was granted immunity from prosecution for his involvement in the murders, was the prosecution's main witness. Hernandez had been working for Douglas in his furniture refinishing shop since 1981. He was paid in food, beer, lodging,and occasional spending money.

On the day of the murders Jones, Krueger, Douglas, and Hernandez drove in Douglas's car to the desert near Indio. The victims believed Douglas was going to pay them to pose nude for photographs. When they arrived at the desert, Douglas told Hernandez to lay a sheet on the ground and prepare drinks for the four of them.

About an hour later, Douglas instructed the victims to remove their clothing. Krueger asked if she could see the money; Douglas showed her a $100 bill. Hernandez, at Douglas's instruction, tied the victims' feet and then tied their hands behind their backs. Douglas then walked to his car and retrieved a rifle. He returned to the victims and told them "[h]ere is the camera." He then told them to make "love to each other." For the next 10 to 15 minutes, Douglas paced back and forth, shouting instructions to the victims. He ordered one victim to orally copulate the other.

Douglas then cut Krueger on the neck with a razor blade and sucked on the wound for about 10 minutes. When Douglas stopped sucking the cut, he retrieved a beer from the cooler and told Hernandez that the women "just couldn't go

back."

Douglas next instructed the victims to orally copulate him while they remained in a kneeling position. The victims next began to orally copulate Hernandez. When he was unable to sustain an erection, he told Douglas that he had to urinate. As he squatted to defecate behind a bush, Hernandez heard one of the victims yell, [l]eave her alone." He walked back toward the victims and saw Douglas choking Jones. He noticed that Krueger appeared dead and that blood was spurting from her mouth. Hernandez claimed that he tried to stop Douglas, but that Douglas knocked him down. According to Hernandez, he was too intoxicated from drugs and alcohol to stop Douglas. After choking Jones, Douglas struck her in the neck with the butt of his rifle, killing her.

Douglas and Hernandez then went to a nearby bar for a drink. When they returned to the scene of the murders, Douglas told Hernandez to untie the ropes and to remove anything from the victims that could be used to identify them. He also told Hernandez to bury the bodies. Douglas left for an hour while Hernandez followed his instructions. When Douglas returned, he and Hernandez drove to Borrego Springs where they placed the victims' clothing in a dumpster. They then drove back to Douglas's shop where they burned the victims' identification.

The next day, Hernandez and Douglas were questioned at the Garden Grove Police Department about the disappearance of Krueger and Jones. Hernandez gave police an alibi that Douglas had concocted a few days earlier. That evening, Douglas and Hernandez left for Canada. Approximately six weeks later, Douglas and Hernandez drove to Nevada where they bought a car and traded its license plates with those on Douglas's car. Two days later, they drove to the murder site to check the grave.

Toward the end of 1982,Douglas and Hernandez returned to Canada. Douglas then left, his destination unknown to Hernandez. While in Canada, Hernandez was questioned

several times by Canadian authorities about the disappearance of the victims. At one point, Hernandez declined offers of immunity and Canadian citizenship in exchange for his testimony.

The bodies of Krueger and Jones were discovered in the Anza-Borrego National Park in 1983. During excavation of the burial site, police collected human teeth, hair, barrettes, and bones. The remains found were matched with the victims' dental charts and X-rays.

Meanwhile, Hernandez had returned to Orange County. After he and Douglas learned that the grave site had been discovered and that warrants had been issued for their arrest, they traveled to Mexico. Douglas left three weeks later. Hernandez stayed in Mexico for approximately 10 months before he was taken into custody by Mexican authorities who had been told by American police detectives that he was wanted in the United States. Before he spoke to the American officers, Hernandez was beaten by Mexican authorities and confessed his role in the murders. He was then turned over to the American authorities.

Douglas was arrested in Las Vegas, Nevada, in February 1984. He signed a waiver of extradition and was returned to California.

Dana Lee also testified for the prosecution. Lee had met Douglas a month before the murders. Several days before the murders, Douglas asked him if he knew any women who would pose nude for photographs. Lee introduced Krueger to Douglas and Krueger introduced Douglas to her roommate Jones. Both women said they planned to pose for Douglas.

Terry Allmon, the victims' roommate, testified that after the victims returned from their initial meeting with Douglas and Hernandez, they told her that they planned to pose nude for money. Jones stated that if she and Krueger were not back by noon the next day, "something was wrong." When Jones did not return home the next day, Allmon became worried and called Jones's mother.

Douglas presented an alibi defense. Henry Akers, who had known Douglas for many years, testified that on the morning of the murders, he spoke to Douglas between 5 and 6:30, the same time Hernandez testified that he and Douglas were driving to the desert with the victims.

Karen Bobie, an acquaintance of Krueger's, testified that she thought she had seen both victims at a mall one month after the murders were committed. Although she had never met Jones, Bobie was familiar with her picture from a missing-persons flyer.

2. Penalty Phase

At the penalty phase, the prosecution introduced evidence of three incidents of prior criminal activity. Julie McGettrick and Vickie Pendleton testified about separate incidents in 1976, when Douglas forced or frightened them into posing for nude photographs or performing sex acts with him in the desert. A third woman, Pamela Williams, testified that in 1977 Douglas sought her participation in a plan to make movies involving the torture and murder of young women. Douglas was charged with attempted murder and other crimes arising out of this plan and, after the jury deadlocked, he pleaded nolo contendere to solicitation to commit an assault.

In mitigation, Douglas presented testimony by his wife, son, a friend, and a neighbor regarding his good character, his nonviolent nature, and his background as an orphan.

B. **Procedural Background**

Douglas's convictions and sentence were upheld on direct appeal. People v. Douglas, 50 Cal.3d 468, 268 Cal.Rptr. 126 (1990), cert. denied, 498 U.S. 1110 (1991).

Douglas filed a petition for habeas corpus in federal court on November 16, 1992. The Court held the federal proceeding in abeyance while Douglas exhausted several claims

in state court. Douglas filed an amended federal petition on January 19, 1994. Respondent filed an answer on April 18, and Douglas filed a traverse on June 24, 1994.

On February 8, 1996, the Court granted an evidentiary hearing on guilt phase claims 6, 25(d), 25(e), 25(j), 25(p), 25(q), 25(r), and penalty phase claims 1(d), 1(i), 7, and 17. The evidentiary hearing was held from February 17 to February 20, 1998. At the evidentiary hearing, witnesses were called and exhibits were received relating to the claims subject to the hearing.

After the hearing, the Court ordered the parties to brief all of the claims in the petition. Douglas filed a brief on July 28, 1998, respondent filed a brief on September 14, and Douglas filed a reply on December 12, 1998.

III. DISCUSSION

A. Application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")

The AEDPA was signed into law on April 24, 1996. The AEDPA does not apply to this case as the federal habeas petition was filed before the new law was enacted. Lindh v. Murphy 521 U.S. 320, 321 (1997). Therefore, in ruling on the petition, the Court applies the habeas corpus law as it existed prior to April 24, 1996.

B. Guilt Phase Claims

Claim 1 - Improper Admission of Hernandez's Testimony

Douglas contends that his conviction is unconstitutional because Hernandez's testimony was "involuntary, coerced, and should not have been admitted because (1) it was a direct product of a coerced Mexican

confession, (2) the American authorities participated in the illegal Mexican confession and exploited its results, and (3) Hernandez's testimony resulted from the prosecutor's threats of the death penalty." (Amended Petition for Writ of Habeas Corpus ["Pet."] at 12.)

a. Underlying Facts

In the spring of 1984, Hernandez was arrested by Mexican police. Detective Johnson of the Anaheim Police Department and Investigator Martinez of the Orange County District Attorney's Office traveled to Mexico to return Hernandez to the United States. When they arrived in Mexico, Johnson and Martinez informed the local police of the murders of Krueger and Jones, showed them the affidavit for the arrest warrant, and provided them with some photographs.

The Mexican officials decided to question Hernandez. When they were unsuccessful in their initial inquiries, they beat him. (Reporter's Transcript ["RT"] 76.) When Hernandez still refused to talk, they ceased the interrogation informing him that he could expect even worse treatment that evening. (PT 80.) As promised, the officers returned later that evening. They told Hernandez that they were going to "take him out to the beach" which Hernandez took to mean that they would kill him. (RT 82-83.) Fearing for his life, Hernandez gave a full confession. His statement was typed and signed after he was told it would not be given to the United States authorities. (PT 84.) Neither the signed statement nor a tape recording of the statement were provided to the defense.

The Mexican police released Hernandez to Johnson and Martinez and gave them a copy of the statement. Johnson and Martinez escorted Hernandez across the border where he was arrested and taken to court for arraignment. Before he was arraigned, Hernandez was returned to the police station to be interviewed by Johnson and Deputy District Attorney Anthony Rackauckas. (PT 89.) Rackauckas did not give Hernandez the

Miranda warnings. Instead, he told Hernandez that the conversation would be "off the record" and that it could not be used against him. Before informing him of the charges he faced and the possible penalties, Rackauckas told Hernandez that he was in "serious trouble." (RT 89.) Rackauckas then stated that he wanted to hear what Hernandez knew about the crimes to see it he could be used as a witness against Douglas. Hernandez agreed to give a statement. During the interview, Rackauckas did not mention the Mexican confession, nor did he inform Hernandez that he had any knowledge of it. Hernandez suspected, but was not sure, that the American authorities had been given the Mexican statement. (RT 93.)

Rackauckas made no offer of leniency before the interview, but indicated afterward that if Hernandez cooperated, the charges against him might be reduced. (RT 138.) During the interview, Hernandez's attorney arrived at the police station. Rackauckas informed Hernandez of this fact but Hernandez indicated he would finish giving his statement before speaking with counsel. (RT 159.)

A few weeks after the interview, following negotiations between the prosecution and his attorney, Hernandez was given immunity in exchange for his testimony. No conditions were placed on the grant of immunity and he was not required to testify in conformity with his earlier representations. However, Hernandez was told that he could be prosecuted for perjury if he testified untruthfully.

The trial court held a hearing on the voluntariness of Hernandez's statement to Rackauckas and concluded "beyond a reasonable doubt to a moral certainty that the statements by Mr. Hernandez were indeed voluntary here in the United States." (PT 187.) However, the court excluded the Mexican confession as involuntary.

The facts developed in state court on the issue of whether Hernandez's trial testimony was coerced are entitled to a statutory presumption of correctness. See 28 U.S.C. § 2254(d).

b. Applicable Law

In general, Douglas does not have standing to challenge an alleged violation of Hernandez's constitutional rights. However, "[c]onfessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause." Clanton v. Cooper, 129 F.3d 1147, 1158 (10th Cir. 1997) (quoting Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994)); see also, United States v. Mattison, 437 F.2d 84, 85 (9th Cir. 1970).

c. Discussion

To obtain relief on this claim, Douglas must establish that Hernandez's trial testimony was coerced. Mattison, 437 F.2d at 85. In Mattison, a prosecution witness was arrested and gave a statement to police. This statement was obtained in violation of the witness's right against self-incrimination and right to counsel. The witness then testified against Mattison at trial. Mattison argued that the witness's trial testimony was so tainted by the illegal interrogation that its admission rendered the trial fundamentally unfair. Id. The Ninth Circuit disagreed, noting that, "[b]y the time of trial, the psychologically coercive atmosphere of that interrogation must have dissipated. There is no indication that [the witness] was told at any time by anyone what he should say on the witness stand." Id. The Mattison court also pointed out that the witness's testimony was subject to cross-examination and that the jury could observe his demeanor and gauge his credibility.

This claim suffers from the same infirmities as the claim in Mattison. As Hernandez acknowledged, the coercive atmosphere of the Mexican police station dissipated when he crossed the border. (RT 121.) He was not confronted with the Mexican confession when questioned by the American authorities. Hernandez had a lawyer negotiate the grant of

immunity, therefore, the prosecution had nothing to hold over his head at trial regarding the murders. There is no evidence that Hernandez was told what to say on the witness stand and he did not have to testify consistently with his statement to Rackauckas to obtain immunity. In addition, Douglas's trial attorney, George Peters, had the opportunity to cross-examine Hernandez about the statements he made to the Mexican and American authorities. (RT 2763-78.) The jury had ample opportunity to observe his demeanor and gauge his credibility. Finally, the jury was given the appropriate instructions as to reasonable doubt, credibility, and immunity to aid them in assessing the value of Hernandez's testimony. (RT 3475-84.) Therefore, the admission of Hernandez's testimony did not violate due process. Claim 1 is DENIED.

Based on the same analysis, Guilt Claims 2, 3, and 4 are DENIED. Douglas has failed to establish that Hernandez's in-court testimony was involuntary, no out-of-court statements were admitted at trial, and Peters had the opportunity to cross-examine Hernandez about the Mexican confession, his conversations with Rackauckas, and the grant of immunity. After a full hearing on the issue, the trial court found that Hernandez's statements to the American authorities were voluntary. The trial was not rendered unfair by the admission of Hernandez's trial testimony and Douglas has failed to establish misconduct on the part of the prosecution.

Claim 5 - Denial of Right to Testify

Douglas argues that "he was denied the right to testify on his own behalf at the guilt and penalty phases." (Pet. at 21.)

a. Applicable Law

A defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense. Rock v. Arkansas, 483 U.S. 44, 51-53 (1987). The right to testify is

personal, it may be waived only by the defendant, and the waiver must be knowing and intelligent. United States v. Edwards, 897 F.2d 445, 446-47 (9th Cir. 1990) (applying United States v. Martinez, 883 F.2d 750, 760 (9th Cir. 1989), vacated on other grounds, 928 F.2d 1470 (9th Cir. 1991)).

The ultimate decision whether to testify rests with the defendant, however, he "is presumed to assent to his attorney's tactical decision not to have him testify." United States v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir.), cert. denied, 120 S.Ct. 453 (1999) (quoting United States v. Joelson, 7 F.3d 174, 177 (9th Cir. 1993)). The trial court need not advise the defendant of his right to testify nor must the defendant waive the right to testify on the record. Id. If the defendant wants to testify, "he can reject his attorney's tactical decision by insisting on testifying, speaking to the court, or discharging his lawyer." Joelson, 7 F.3d at 177 (citing Martinez, 883 F.2d at 761). "Thus, waiver of the right to testify may be inferred from the defendant's conduct and is presumed from the defendant's failure to testify or notify the court of his desire to do so." Id (citing Edwards, 897 F.2d at 446).

b. Discussion

Douglas claims Peters prevented him from testifying and that he was not aware he had the right to insist on testifying. The state court record belies this claim. Based on the transcript of a motion to substitute counsel held after the guilt phase, the Court finds that Peters convinced Douglas that it was in his best interest not to testify. Peters told the trial judge, "I thought it would be ridiculous for Mr. Douglas, absolutely ridiculous for Mr. Douglas to testify. And we had a lengthy conversation about that." (3(b) Supplemental Clerk's Transcript ["Supp CT"] 529). Peters later stated that, "Mr. Douglas could or would have said something if I precluded him from taking the stand, and he was in full agreement with that. And that's why he didn't testify." (3(b) Supp CT 532.) Douglas did not dispute Peters's

statements at the hearing.

Based on the information contained in the state court record, the Court finds that Douglas waived his right to testify. It would be unfair for a petitioner to take his counsel's advice not to testify and then invalidate the trial because he took that advice. See Martinez, 883 F.2d at 761. Claim 5 is DENIED.

Claim 6 - Denial of Right to be Present

Douglas argues that his conviction was unconstitutional because neither he nor Peters were present when testimony was reread to the jury. (Pet. at 22.)

a. Underlying Facts

After the guilt phase, the jury requested that the testimony of Kathy Phillips, Dana Lee, Henry Akers, Frank Tieffer, and Donald Hemmer be reread. (CT 1212.) After a conference with Peters and the prosecutor, the trial court ordered the court reporter to read back the testimony of Lee, Akers, Tieffer, and Hemmer. (PT 3504.)

b. Applicable Law

A defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. at 108. This right includes the right to be present when testimony is read back to the jury. Healer v. Borg, 50 F.3d 1472,1477 (9th Cir. 1995). The right cannot be waived by trial counsel, the defendant must waive it personally. United States v. Kupau, 781 F.2d 740, 743 (9th Cir. 1986). However, the claim is subject to the harmless error

analysis. In the habeas context, an error is harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 (1993).

c. Discussion

The Court held an evidentiary hearing on this claim. At the hearing, Peters testified that he informed Douglas that the jury had requested that certain testimony be read to it. Peters informed Douglas that the "usual custom and practice in the Orange County courthouse was for the court reporter to go in and reread testimony without the attorneys being present." (2/17 Evidentiary Hearing Transcript ["EH"] 169-70.) Douglas told Peters that he did not want to be present during the readback and Peters informed the court of that fact. (2/17 EH 170.) Therefore, Douglas waived his right to be present during the readback.

Even assuming Douglas had not waived his right to be present, the error was harmless. Douglas claims the error was prejudicial because Phillips's testimony was not read to the jury even though it had requested her testimony to be read. Phillips testified that in 1979 she participated in a photo session at Douglas's shop during which he photographed her in the nude while she was bound and gagged. The next month, Douglas asked Phillips if she wanted to make more money. Douglas told her that "he wanted to take some more pictures of other women and take them out in the desert and make what he -- what he referred to as a snuff flick or movie or whatever." (RT 2062.) Douglas then told Phillips that he wanted her to drug the girls and to "have sex with them and . . . be really brutal" (RT 2070), and that he "would just make a movie and it would be a lot of bondage and sadistic-type things." (RT 2063.)

Based on the content of Phillips's testimony, the failure to read her testimony back to the jury was harmless. Peters recognized that Phillips's testimony was "extremely

harmful." (2/17 EH 172.) David Whitney, respondent's Strickland expert, concurred stating that her testimony was very damaging." (2/19 EH 156.) The Court agrees. The failure to ensure that Phillips's testimony was reread did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638.

Based on the foregoing, Claim 6 is DENIED. The Court also DENIES the related ineffective assistance of counsel claim (Claim 25(j)). Douglas suffered no prejudice from Peters's failure to ensure that one of them was present during the readback.

Claim 7 - The Prosecution Withheld Evidence of Promises and Inducements Made to Hernandez

Douglas argues that the prosecution "withheld evidence of promises and inducements made to Hernandez in order to obtain his testimony, and misrepresented to the trial court the state's intentions concerning the sentence of Hernandez for drug related offenses committed while he was in custody." (Pet. at 24.)

a. Underlying Facts

While he was in jail waiting to testify against Douglas, Hernandez was charged with possession of marijuana and drug paraphernalia. Peters attempted to cross-examine Hernandez regarding the charges, but Hernandez invoked the Fifth Amendment and refused to answer any questions regarding the pending charges. Peters asked the trial court to grant Hernandez use immunity, but Rackauckas objected stating that he was "very, very reluctant" to give Hernandez anything less than a jail term for the crimes. Rackauckas did not want Hernandez to be given immunity so that Peters could question him on a collateral issue. The trial court agreed, stating that

Hernandez had "an absolute right to remain silent." (RT 2802-03.) Therefore, Peters was unable to directly question Hernandez about the charges.

Two days after Douglas was sentenced to death, Hernandez pled guilty to one count of conspiracy to possess marijuana. He was sentenced to one year of unsupervised probation. (4 Supp. CT 8-9.) Douglas alleges that Rackauckas misrepresented his position and failed to disclose promises and inducements made to Hernandez to prevent the trial court from granting him use immunity.

b. Applicable Law

The prosecution has a duty to turn over all exculpatory evidence to the defense. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)). However, disclosure is only required when the evidence is material. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

c. Discussion

Douglas has alleged no facts to support a Brady violation. The allegation that the State misrepresented its position regarding the disposition of Hernandez's drug charge does not give rise to a valid claim unless Douglas could show

that the prosecution promised Hernandez a particular disposition in exchange for his testimony. Douglas has alleged no facts to suggest the existence of such an undisclosed deal.

Even if Douglas established that an undisclosed deal existed, he would not be entitled to relief. The evidence concerning additional promises or inducements is not material. Hernandez had already been granted immunity for his participation in the murder of Jones and Krueger and Peters used that fact to discredit him. The fact that Hernandez might also have been given a deal on a relatively small drug charge is insignificant in light of the fact that, by testifying, he avoided a substantial prison term as an accessory to murder. Claim 7 is DENIED.

For the same reasons, the related ineffective assistance of counsel claim (Claim 25(b)) is DENIED.

Claim 8 - Restriction of Cross-Examination

Douglas argues that the trial court improperly restricted Peters's cross-examination of Hernandez. (Pet. at 27.)

a. Underlying Facts

This claim is based on the same facts as Claim 7. Douglas argues that the trial court should have allowed Peters to cross-examine Hernandez regarding the drug charges pending against him.

b. Applicable Law

A defendant in a criminal case has a "right to cross-examine adverse witnesses to uncover possible bias and to expose the witness's motivation in testifying." Reiger v. Christiansen, 789 F.2d 1425, 1433 (9th Cir. 1986). However, the right to cross-examination is subject to the broad discretion

of the trial judge. Davis v. Alaska, 415 U.S. 308, 316 (1974).

A denial of the right of cross-examination is subject to a harmless error analysis. To test for harmless error the Court is "to assume that the damaging potential of the cross-examination would be fully realized and then to determine whether the error was harmless in light of the importance of the witness's testimony in the entire case, the extent of cross-examination otherwise permitted and the overall strength of the prosecution's case." United States v Miguel, 111 F.3d 666, 671-72 (9th Cir. 1997) (internal quotation and citation omitted).

c. Discussion

In this instance, any restriction of cross-examination was harmless. Although Hernandez's testimony was very important to the prosecutions's case, the cross-examination permitted was extensive. Peters elicited testimony from Hernandez that the drug charges were pending. Peters called witnesses who testified regarding Hernandez's possession and use of the drugs in jail, and the trial court told Peters that he could argue to the jury that Hernandez had used drugs in jail. (RT 3065-3110.) In addition, Hernandez testified that he had regularly used heroin, uppers, downers, quaaludes, and marijuana for 20 years, drank heavily, had been arrested and convicted of robbery, and lied to police on a regular basis. (RT 2656, 2653-59.)

Douglas was able to expose the essential facts regarding Hernandez's use of drugs in jail, the cross-examination permitted was extensive, and the prosecution's overall case against Douglas was strong, therefore, any alleged error in the restriction of cross-examination did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638. Claim 8 is DENIED.

Claim 9 - Denial of Motion for Change of Venue

Douglas claims the jury was exposed to prejudicial pretrial publicity which deprived him of a fair trial. (Pet. at 28-29.)

a. Underlying Facts

Peters made a pretrial motion for change of venue. In support of the motion, the defense submitted 55 newspaper articles discussing the 1977 crimes and 9 newspaper articles discussing the 1982 murders. (9 Supp CT 2-55.)

In considering the motion, the trial court noted that the articles discussing the 1977 crimes were "highly inflammatory," that the "nature and gravity of the offense is certainly a major factor in this particular case," and that the status of the victim and the defendant in the community held little weight. (Pre-Trial Transcript ["PT"] 106-07.) The trial court denied the motion on the grounds that the news coverage relating to the 1982 crimes was less than the coverage for the 1977 crimes and the size of the county was such that Douglas could obtain a fair trial. (PT 108.) The trial court noted that, despite the pervasive and inflammatory publicity in 1977, Douglas was able to obtain a fair trial as evidenced by the verdict in that case. (PT 106.)

b. Applicable Law

A criminal defendant has a right to be tried by a panel of impartial, indifferent jurors. "Accordingly, a trial judge must grant a motion for change of venue if prejudicial pretrial publicity makes it impossible to seat an impartial jury." Ainsworth v. Calderon, 138 F.3d 787, 795, amended, 152 F.3d 1223 (9th Cir. 1998) (internal quotation omitted). A federal habeas court must "make an independent review of the record to determine whether there was such a degree of prejudice

against the petitioner that a fair trial was impossible." Harris v. Pulley, 885 F.2d 1354, 1360 (9th Cir. 1988) (quoting Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984)). "A reviewing court must independently examine the exhibits containing news reports about the case for volume, content, and timing to determine if they were prejudicial." Id.

The impact of pretrial publicity is tested under either the presumed prejudice or actual prejudice standards. "Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." Ainsworth, 138 F.3d at 795 (internal quotation omitted). Presumed prejudice is reserved for extreme situations.

Among the factors to be considered in a presumed prejudice argument is whether there was a "barrage of inflammatory publicity immediately prior to trial amounting to a huge . . . wave of public passion." Patton v. Yount, 467 U.S. 1025, 1033 (1984) (internal quotation omitted). The Court will also consider whether the media accounts were primarily factual as such accounts tend to be less prejudicial than inflammatory editorials or cartoons. See Harris, 885 F.2d at 1362. A final factor is whether the media accounts contained inflammatory, prejudicial information that was not admissible at trial. See Sheppard v. Maxwell, 384 U.S. 333, 360-61 (1966).

To determine whether actual prejudice existed, the Court "must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside." Harris, 885 F.2d at 1363.

c. Discussion

The Court independently reviewed the evidence presented at the motion for change of venue and finds that the publicity surrounding the trial did not rise to the level of presumed prejudice. The lurid nature of the offenses coupled with Douglas's previous arrest made the case newsworthy. The

publicity relating to the capital crimes was primarily factual, but did contain information regarding Douglas's prior arrest that was not admissible at trial. Orange County's population at the time was approximately 2,000,000, and neither Douglas nor the victims were prominent members of the community. In addition, the number of articles published in 1984 was relatively modest. Based on all the circumstances, the publicity was not such that it could be said to have saturated the community.

To determine whether actual prejudice existed, the Court "must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside." Harris, 885 F.2d at 1363. In this case, it is difficult to make that determination with absolute certainty. Peters did not conduct detailed voir dire on the issue of the jurors' exposure to pretrial publicity because he did not want to bring up Douglas's 1977-78 arrest and trial. However, the trial court did conduct some voir dire to determine if any of the jurors knew Douglas or if his name "[rang] a bell." (See RT 214, 223, 235, 242, 245-46, 260, 1225, 1291.) One juror was excused because she had read about the case (RT 252-53), another was excused because she had heard people discussing the case at a party (RT 1738-40), and a third was excused because he heard news reports about the case. (RT 1779-84.)

The trial court attempted, without discussing the prior arrest, to determine whether any of the prospective jurors had heard anything about Douglas or about the case. Only four prospective jurors responded that they had heard anything about the case. The jurors who responded that they had heard about the case and could not be impartial were excused. Therefore, the Court must conclude from the facts before it that the remaining jurors had no knowledge of Douglas, his crimes, or his prior arrest and conviction. In addition, the publicity surrounding the capital crimes was not overly inflammatory and was factual in nature. Only two of the nine articles submitted by the defense mentioned Douglas's prior arrest. (9 Supp CT 49, 55.) The last article was published over three months before

voir dire began. Finally, Douglas made the strategic decision to avoid any mention of his prior arrest and conviction. Therefore, he cannot now complain that he was unable to adequately gauge the effect of pretrial publicity during voir dire.

Douglas has failed to establish that the jurors "demonstrated actual partiality or hostility that could not be laid aside." Harris, 885 F.2d at 1363. This conclusion is supported by the fact that Peters did not use all of his allotted peremptory challenges and did not object to the jury as finally composed. (RT 1826.) Therefore, he must have been satisfied with the jury as selected. See Fetterly v. Paskett, 163 F.3d 1144, 1148 (9th Cir. 1998).

Based on the foregoing, Claim 9 is DENIED. For the same reasons, the Court DENIES the related ineffective assistance of counsel claims (Guilt Claim 25 (h) and Penalty Claim 1 (b)).

Claims 10 and 11 - Denial of Motion for Appointment of Counsel

In two closely related claims, Douglas argues that the trial court erred in denying his request for the appointment of counsel to assist him in bringing a motion to relieve Peters as his attorney and in denying the actual motion to relieve Peters. (Pet. at 31, 35.)

a. Underlying Facts

On November 27, 1984, after the jury returned a guilty verdict, the trial court held an in camera hearing on Douglas's Marsden motion to relieve trial counsel.[6] The court

---

6. People v. Marsden, 2 Cal.3d 118, 84 Cal.Rptr. 156 (1970), requires a state trial court to listen to a defendant's reasons for wanting to substitute counsel and to exercise discretion as to whether to grant the substitution.

felt the motion was untimely but agreed to hear it to decide if another attorney should be appointed at the penalty phase. Douglas, in a declaration attached to his motion and at the hearing, raised several areas of alleged incompetence by Peters. Peters then responded to each issue. The trial court denied the motion after finding that the "alleged incidences of incompetence" were trial tactics. (RT 3517.) Douglas then asked the court to appoint an attorney to help him with the Marsden motion which he claimed was not finished. The judge denied the request. (RT 3518.)

On December 4, 1984, after the penalty verdict, the trial court heard Douglas's request for substitute counsel to be appointed for the limited purpose of determining whether Peters was incompetent or whether a conflict between Peters and Douglas prevented Peters from providing effective assistance at the post-trial motions. The court agreed to appoint a lawyer for this purpose. (RT 3979.)

On January 4, 1985, Jerry Goldfein made a special appearance for Douglas. Goldfein stated that he thought there were some issues of ineffective assistance that could be raised, but he would have to review the trial record to make a final determination. (RT 3999-4000.) Peters argued that Douglas wanted a new trial and that ineffective assistance of counsel was a viable basis for a motion for new trial. Peters proposed several options to the court, including appointing an attorney to handle only issues of ineffective assistance at the motion for new trial and having Peters handle the remaining issues. (RT 3995-96.) The trial judge responded by stating that, after presiding over the trial, he could not "just off the top of [his] head, find any incompetence at all." (PT 4002.) The judge then denied the motion for substitute counsel. (RT 4004.) Peters conducted the motion for new trial and did not allege his own ineffectiveness.

b. Applicable Law

The refusal to allow a substitution of attorney may result in a denial of the constitutional right to counsel "if the defendant and his attorney are embroiled in an 'irreconcilable conflict.'" United States v. McClendon, 782 F.2d 785,789 (9th Cir. 1986) (quoting Brown v. Craven, 424 F.2d 1166,1170(9th Cir. 1970)). In reviewing a trial court's denial of substitution, the ultimate question the Court must answer is whether "the conflict between [petitioner] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Schell v. Witek, 218 F.3d 1017, 1026 (9th Cir. 2000).

c. Discussion

Claim 10 alleges that Douglas was denied the effective assistance of counsel by the trial court's refusal to appoint counsel to assist him in asserting his right to the appointment of substitute counsel. Douglas has presented no authority and the Court is aware of none for the proposition that a defendant is entitled to an attorney to argue a motion for substitution of counsel.

Claim 11 alleges that Douglas was deprived of due process and the effective assistance of counsel when the trial court denied the motion to appoint substitute counsel.

Douglas has failed to establish that the alleged conflict in this case resulted in a total lack of communication between he and Peters. The basis for Douglas's motion to substitute counsel was Peters's alleged incompetence. The trial court reviewed the motion and held a hearing on it. During the hearing, Peters discussed each alleged claim of ineffectiveness and Douglas was given an opportunity to respond to Peters's explanations. (3(b) Supp CT 494-533f.) The trial court then

denied the motion after finding that the "alleged incidences of incompetence" were trial tactics. (PT 3517.)

Douglas did not allege in the motion or at the hearing that he and Peters could not communicate. In fact, Douglas told the trial court that he and Peters "get along fine." (3(b) Supp CT 498.) The important issue in a claim of denial of a motion to substitute counsel is "the nature and extent of the *conflict* between defendant and counsel, not [] whether counsel is legally *competent*." United States v. Walker, 915 F.2d 480, 483 (9th Cir. 1990). Douglas has failed to establish the existence of an irreconcilable conflict.

Based on the foregoing, Claims 10 and 11 are DENIED.

Claim 12 - Conflict of Interest

Douglas claims Peters had a conflict of interest because Peters failed to disclose "that he had worked as a district attorney in the office which had prosecuted Petitioner in 1977-78 and was personally acquainted with the prosecutor of Petitioner's 1977-78 case." (Pet. at 36.) Douglas claims the conflict of interest affected Peters's performance because he did not adequately challenge the validity of the earlier charges and failed to effectively cross-examine penalty phase witnesses who testified at the 1978 trial.

A criminal defendant has a right to the undivided loyalty of his attorney. Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988). To "establish a sixth amendment violation based on a conflict of interest the defendant must show 1) that counsel actively represented conflicting interests, and 2) that an actual conflict of interest adversely affected his lawyer's performance." Id. at 579.

This claim is without merit. Douglas has set forth no authority for the proposition that Peters's prior employment as a deputy district attorney or his acquaintance with the attorney who prosecuted the earlier case amounts to an actual conflict of

interest. Douglas has failed to show that Peters was actively representing conflicting interests or that the alleged conflict had an adverse impact on his representation. Claim 12 is DENIED.

Claim 13 - Failure to Present Evidence of Hernandez's Incompetence to Testify

Douglas argues that Peters's representation was deficient because he failed "to investigate, prepare, present evidence and argue to the trial court that Hernandez was incompetent to testify at trial." (Pet. at 37.) Douglas argues that Peters should have investigated Hernandez's competence to testify because he was a confessed heroin addict and was awaiting trial on drug charges.

Douglas has not established that Hernandez was incompetent to testify. Based on the Court's review of the state court record, Hernandez was able to clearly recall and narrate the facts of the case. There is no indication from the record that his speech or demeanor suggested that he was under the influence of drugs or alcohol. Neither the trial court, the prosecutor, nor defense counsel raised the issue of Hernandez's competence to testify. Douglas has failed to establish that any reasonable attorney would have investigated Hernandez's competence to testify and has failed to establish prejudice as a result of the alleged omission. Claim 13 is DENIED.

For the same reasons, the Court DENIES the related ineffective assistance of counsel claim (Claim 25(n)).

Claims 14 and 15 - Failure to Preserve Exculpatory Evidence and Failure to Impose Sanctions

In two related claims, Douglas argues that the Anaheim Police Department failed to preserve and timely disclose exculpatory evidence and that the trial court failed to grant a motion to dismiss and or impose a sanction for loss of

evidence. (Pet. at 39, 42.)

a. Underlying Facts

Detective David Grace of the Anaheim Police Department was working in the missing persons department trying to locate Krueger and Jones. (RT 1834-35.) He was also working on between 30 and 40 other missing persons cases per month. (RT 1864.) Grace's missing persons files were not turned over to the defense until the time of trial. At trial, the defense filed a motion to dismiss the case or for sanctions for the police department's failure to preserve exculpatory evidence.

Grace testified at a hearing on the defense motion to dismiss that he received a call from Jones's mother who told him that a man named George Beckett called her from a pay phone at a truck stop In El Paso, Texas, and said he saw one of the victims at the truck stop. (RT 1838-39.) Grace testified that he tried the phone number given to him by Mrs. Jones approximately five times but no one answered. (RT 1881.)

Grace also received a phone call from a Sandy Maren who said she saw one of the victims at a nightclub in Orange County. (RT 1850-51.) He took her name and phone number and told her to call him back if she ever saw the girl again. Maren never called back and Grace never tried to contact her.

Douglas claims that, by the time he got the missing persons file, he could not locate Beckett and the phone number given by Maren had been disconnected. He contends that the prosecution's failure to follow up on this evidence and failure turn over the missing persons file in a timely manner deprived him of material exculpatory evidence.

b. Applicable Law

Failure to preserve potentially exculpatory evidence does not constitute a denial of due process unless a defendant can show bad faith. Arizona v. Youngblood, 488 U.S. 51, 57-

59 (1988). In this case, the police preserved the evidence they had. This claim is more appropriately phrased as a failure to investigate potentially exculpatory evidence. "A failure to collect potentially exculpatory evidence can constitute a violation of the due process clause only if bad faith is shown." United States v. Garcia, 37 F.3d 1359, 1366 (9th Cir. 1994)

c. Discussion

Douglas has failed to establish bad faith on the part of the Anaheim Police Department. Therefore, Douglas has failed to establish that he is entitled to relief on the claim that the State failed to collect exculpatory evidence and the trial court did not err in failing to sanction the prosecution. Claims 14 and 15 are DENIED.

Claim 16 - Trial Court Improperly Excluded Exculpatory Evidence

Douglas contends that the trial erred when it "barred probative material evidence that someone named 'Doug' (other than Petitioner) called the police with information concerning the whereabouts of Beth Jones and Margaret Krueger." (Pet. at 43.)

a. Underlying Facts

At trial, Douglas wanted to introduce the testimony of Don Hemmer, Krueger's boyfriend, that he received a telephone call from someone who identified himself as "Doug," asked about Krueger, and intimated that she had gone to Arizona. (RT 2998.) The trial court refused to admit the evidence on hearsay grounds. (RT 3059.) Douglas argues that the evidence was not being offered for the truth of the matter asserted, but instead was offered to demonstrate that someone was "passing himself off as 'Doug' and expressing an interest in the two women who

had disappeared." (Pet. at 44.)

b. Applicable Law

This is an issue of the application of state evidentiary law. A federal court cannot consider a claim of violation or erroneous application of state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991). A federal court may grant habeas relief on a state law claim in those rare instances where the violation of state law amounts to a due process violation. Pulley v. Harris, 465 U.S. 37, 41 (1984). Thus, the Court must determine whether the trial court's evidentiary ruling "so fatally infected the proceedings as to render them fundamentally unfair." Jammal v. Van de Kamp, 926 F.2d 918,919 (9th Cir. 1991).

c. Discussion

The evidence Douglas contends should have been introduced was only marginally relevant and not persuasive. In addition, the California Supreme Court held that the evidence was inadmissible hearsay. Douglas, 50 Cal.3d at 514. In federal court, Douglas merely argues that the evidence was admissible under state law and that the trial court erred in excluding it. He has failed to allege any facts to support the argument that the trial court's refusal to admit the evidence at issue rendered the trial fundamentally unfair. Therefore, Claim 16 is DENIED.

For the same reasons, Penalty Claim 3 is also DENIED. The trial court's refusal to admit the evidence in question did not render the penalty trial fundamentally unfair.

Claim 17 - Erroneous "Malice" and Second Degree Murder Instructions

Douglas argues that the trial court gave an erroneous jury instruction on the "malice" element of the charge of murder

and on second degree murder. (Pet. at 45.)

a. Underlying Facts

During guilt phase deliberations, the jury requested copies of the instructions regarding first and second degree murder and the special circumstance of multiple murder. The parties agreed that the court should provide the jury with the requested instructions. The trial court granted the jury's request and admonished the jury that it was not to consider portions of the instructions that had been deleted and that it was to follow all handwritten directions noted by the court in the margins. (RT 3505-06.) The jury was given a copy of a California Jury Instruction - Criminal ("CALJIC") on malice (No. 8.11) that contained substantial deletions and annotations.[7/]

The jury was also provided with a written version of the second degree murder instruction that differed from the instruction read by the court. The written version of CALJIC 8.31 contained various interlineations, however, the trial court

---

7. The instruction given to the jury provided as follows: "Malice" may be either express or implied. [Malice is express when there is manifested an intention unlawfully to kill a human being.] [Malice is implied [when the killing results from an intentional act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with a wanton disregard for human life][or] [when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.] (CT 1272.)

read the crossed-out portion of the instruction to the jury, then informed it not to consider that portion. The written version of the instructions stated:

> Murder of the second degree is [also] the unlawful killing of a human being as the direct causal result of an intentional act,(involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with wanton disregard for human life.] [or] [the natural consequences of which are dangerous to life, which act was deliberately performed by person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life.]

(CT 1277.)

The California Supreme Court found no error in providing the 1979 written version of the second degree murder instruction to the jury while the 1983 version was read by the trial judge in open court. The state court held that both versions of the instruction conveyed to the jury its obligation to find that Douglas had subjective knowledge of the risk involved in his conduct. Douglas, 50 Cal.3d at 514-16.

b. Applicable Law

The Court will not review this claim to determine if the jury instruction was proper under state law. A faulty jury instruction compels the issuance of a writ only where "'the ailing instruction so infected the entire trial that the resulting conviction violates due process.'" McGuire, 502 U.S. at 72 (quoting Cupp v. Naughton, 414 U.S. 141, 147 (1973)). It is not enough that the instruction is "undesirable, erroneous, or even universally condemned" to warrant habeas relief the instruction must have violated some constitutional right.

Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (quotation omitted). Whether the instruction violated due process depends "upon the evidence in the case and the overall instructions given to the jury." Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995).

Douglas failed to object to the instruction at issue. In this circumstance, federal courts in direct appeal cases have reviewed the alleged instructional error for plain error. See, e.g., United States v. English, 92 F.3d 909, 914 (9th Cir. 1996). Plain error is an actual error that is clear and obvious under current law. United States v. Olano, 507 U.S. 725, 734 (1993). When plain error affects "substantial rights" the court has the authority to exercise its discretion to reverse a conviction. Id. at 734-35. A plain error affects substantial rights when the error was prejudicial in that it "affected the outcome of the [trial court] proceedings." Id. at 731. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Id. Finally, the discretion to correct the error should be employed only in those cases "'in which a miscarriage of justice would otherwise result.'" Id. at 736 (quoting United States v. Young, 470 U.S. 1, 15 (1985)). Although plain error is a direct appeal standard, "[T]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Therefore, if Douglas is unable to establish plain error, he will not be entitled to habeas relief.

c. Discussion

The trial court granted the jury's request and provided copies of the instructions relating to first and second degree murder. Neither the defense nor the prosecution objected to the instructions given to the jury. The malice instruction read to the

jury was identical to the written malice instruction provided to the jury. (Compare RT 3486, CT 1272.) The jury was instructed not to consider the portion of the instruction that was crossed-out. Jurors are presumed to follow instructions. United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996). Therefore, there was no plain error as a result of the trial court's handling of CALJIC 8.11.

Although it appears that the trial court erred in reading the crossed-out portions of CALJIC 8.31, Douglas has failed to show plain error. The California Supreme Court held that because both the oral and written instructions required the jury to find that Douglas had subjective knowledge of the risk involved in his conduct, "the jury was not misled when the court read the entire version of CALJIC No. 8.31 even though the jury was thereafter provided with only the first half of CALJIC No. 8.11 during its deliberations." Douglas, 509 Cal.3d at 516. The Court agrees with the California Supreme Court's holding.

Based on the foregoing, Douglas has failed to establish plain error as a result of the trial court's actions regarding the malice and second degree murder instructions. Claim 17 is DENIED.

Claim 18 - Erroneous Special Circumstance Instruction

In a related claim, Douglas argues that the trial court erred in giving the jury confusing and misleading special circumstance instructions. (Pet. at 47-48.)

a. Underlying Facts

Douglas argues that the special circumstance instructions were confusing because the trial court had struck paragraphs four through six of one multiple-murder special circumstance instruction (CALJIC No. 8.80), and had written notes in the instruction's side margins. Douglas contends the

trial court erred by allowing the jury to see the portions of the instruction that had been rejected after failing to provide a proper admonition to the jury that it should not engage in speculation on why the changes had been made.

b. Applicable Law

The applicable law is set forth in the discussion of Claim 17.

c. Discussion

The trial court granted the jury's request and provided copies of the instructions relating to the special circumstance allegations. Douglas did not object to the instructions given to the jury. The jury was instructed not to consider the crossed-out portion of the instruction. Jurors are presumed to follow instructions. Span, 75 F.3d at 1390. There was no plain error and Claim 18 is DENIED.

Claims 19 and 20 - Improper Admission of Phillips's Testimony

In Claim 19, Douglas argues that the trial court "improperly admitted the irrelevant testimony of Kathy Phillips concerning Petitioner's 'bad character.'" (Pet. at 49.) In Claim 20, Douglas argues that the admission of Phillips's testimony resulted in a denial of due process because the prejudicial impact far outweighed its probative value. (Pet. at 51.)

Phillips testified at trial that three years before the she posed nude for Douglas. She was bound and gagged during session, and Douglas instructed her to look scared. A month Douglas asked her to help him make "snuff" films in which he film the torture and murder of young women. (RT 2062.)

This claim raises an issue of the application of state law. A federal court cannot consider a claim of violation or

erroneous application of state law. McGuire, 502 U.S. at 67. A federal court may grant habeas relief on a state law claim in those rare instances where the violation of state law amounts to a due process violation. Harris, 465 U.S. at 41. Thus, the Court must determine "whether the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair." Jammal, 926 F.2d at 919.

The admission of Phillips's testimony did not render the trial fundamentally unfair. The California Supreme Court held that the evidence was admissible under state law. Douglas, 50 Cal.3d at 510. Douglas argues that the state court's holding was erroneous. However, "federal habeas relief is not available for attacks on violations of state law or procedure and is unavailable for alleged error in the interpretation or application of state law." Fuller v. Roe, 182 F.3d 699, 703 (9th Cir. 1999). Claims 19 and 20 are DENIED.

Claim 21 - Trial Court Improperly Excused Two Prospective Jurors

Douglas argues that the trial court erred in excusing two prospective jurors who expressed "conscientious opposition" to the death penalty but whose views would not have prevented or substantially impaired their duties as jurors. (Pet. at 52.)

a. Underlying Facts

Potential juror Michael Gonzales was asked during voir dire whether he would vote for a verdict less than first degree murder in the guilt phase to avoid the penalty phase. Gonzales responded, "I would, Your Honor, because I do not believe in the death penalty." (RT 893.) Peters then explained California's death penalty scheme to Gonzales and asked him if he could foresee a set of circumstances under which he would vote for the death penalty. Gonzales responded, "I don't think

so. I don't believe in the death penalty." (RT 897.)

During questioning by Rackauckas, Gonzales equivocated somewhat and stated, "I am almost sure. Let me put it that way. I am possibly sure that I would not vote for the death penalty." (RT 898.) Rackauckas remarked on Gonzales's equivocation and asked him, "is there any case where you would ever vote for the death penalty as opposed to life without parole?" Gonzales answered, "No, I wouldn't vote for the death penalty in any case." (RT 899.)

Potential juror Marilyn Zumwalt was also questioned regarding her views on the death penalty. She responded that she would vote for a verdict less than first degree murder at the guilt phase to avoid a penalty phase. (RT 350.) Under questioning by Rackauckas, Zumwalt stated that she would not vote for death "regardless of the evidence." (RT 352.) Rackauckas moved to excuse her for cause. After a defense objection, the trial court asked Zumwalt, "In your opinion, Mrs. Zumwalt, there is no case, no matter how heinous the crime may be, and no matter how guilty the party may be, you would never vote for the death penalty." Zumwalt responded that she would never vote for the death penalty. The trial court then excused her for cause without giving Peters an opportunity to rehabilitate her answers. (RT 352.)

b. Applicable Law

A juror may be excused if the juror's capital punishment views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The "Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated trial, of prospective jurors whose opposition to the death penalty is so strong it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." Lockhart v.

McCree, 476 U.S. 162 (1985).

c. Discussion

Jurors Zumwalt and Gonzales clearly stated that their views on capital punishment would prevent the performance of their duties. They were thus properly excused for cause. Claim 21 is DENIED.

Claim 22 - Lack of Territorial Jurisdiction

Douglas argues that the "Superior Court of Orange County lacked territorial jurisdiction over [his] case, and [he] was therefore denied his right to a jury from a representative cross section of the community in which the alleged crime occurred." (Pet. at 54.)

a. Underlying Facts

The murders occurred in the Anza-Borrego State Park in San Diego County. Douglas and Hernandez were initially charged in Orange County with conspiracy to commit murder, murder, and conspiracy to engage in prostitution. The conspiracy charges were dismissed against Douglas and Hernandez after Hernandez was granted immunity. Douglas then moved to dismiss the case for lack of jurisdiction. The municipal court held that it had territorial jurisdiction to hear Douglas's case because, pursuant to California Penal Code § 781,[8] "preliminary arrangements, which led to the commission

---

8. Penal Code § 781 provides, in relevant part:

> When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of

of the offense, were held in Orange County." (CT 660.) The superior court also ruled that it had jurisdiction over the case, notwithstanding the dismissal of the conspiracy charges.

b. Applicable Law

Whether Douglas was tried in the appropriate county is a question of the application of state law. A federal court cannot consider a claim of violation or erroneous application of state law. McGuire, 502 U.S. at 67. However, a federal court may grant habeas relief on a state law claim in those rare instances where the violation of state law amounts to a due process violation. Harris, 465 U.S. at 41.

c. Discussion

The fact that Douglas was tried in Orange County rather than San Diego County did not render the trial fundamentally unfair. Douglas, Hernandez, Jones, and Krueger all lived in Orange County. Douglas met the victims in Orange County and picked them up at a 7-Eleven in Orange County before taking them to the desert in San Diego County. (RT 2381-82.) After the murders, which were committed in San Diego County, Douglas and Hernandez returned to Orange County where they destroyed evidence of the crimes. (RT 2564-66.) The California Supreme Court held that "the preliminary arrangements made by the defendant in Orange County were sufficient to confer territorial jurisdiction on the Orange County courts." Douglas, 50 Cal.3d at 494. This Court will not second-guess the California Supreme Court in the

---

the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory.

application of state law and Douglas has failed to establish that he was denied a fair trial because he was tried in Orange rather than San Diego County. Claim 22 is DENIED.

Claim 23 - Prosecutorial Misconduct in the Guilt Phase

Douglas contends that his conviction was unconstitutional as a result of several instances of prosecutorial misconduct. The 28 subclaims are addressed individually below.

a. **Claim 23(a)- Failure to Disclose the Reports of the Mexican and Canadian Authorities**

Douglas claims the prosecution did not turn over reports and statements obtained from Canadian and Mexican law enforcement relating to Hernandez, including the audiotape of a statement he made to Mexican police. (Pet. at 56.)

Douglas contends that the prosecution had in its possession and failed to disclose reports from Canadian and Mexican law enforcement officials regarding their contacts with Hernandez. He argues that the Canadian police reports contained crucial impeachment of Hernandez and that the Mexican police reports would have established a link between American officials and the Mexican interrogation of Hernandez. However, Douglas did not submit the reports which he contends should have been disclosed in support of his claim and failed to allege what information was contained in those reports.

The prosecution has a duty to turn over all exculpatory evidence to the defense. Brady, 373 U.S. at 87. This duty extends to information which is relevant to the credibility of a witness. Giglio, 405 U.S. at 154. However, disclosure is only required when the evidence is material. Evidence is material if "there is a reasonable probability that,

had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682.

Douglas has failed to establish that the evidence he contends should have been turned over was material. He has provided no evidence regarding the content of the foreign police reports. Based on the information developed in the state court, it appears that Hernandez's statement to the Mexican police was simply a less-detailed version of the statement he provided to American authorities. (See RT 91.) Therefore, it is unclear how the Mexican documents could have helped Douglas. In addition, Peters cross-examined Hernandez regarding the statements he made in Mexico and his contacts with Canadian law enforcement. (RT 2756-57; 2767-78.) In sum, Douglas has failed to establish that, had the Canadian and Mexican police reports been disclosed to the defense, there is a reasonable probability that the result of the guilt phase would have been different. Claim 23(a) is DENIED.

For the same reasons, the related ineffective assistance of counsel claim (Claim 25(a)) is DENIED. Douglas has failed to establish prejudice as a result of trial counsel's alleged errors.

b. Claim 23 b - The Prosecution Withheld Evidence of Promises and Inducements Made to Kathy Phillips

Phillips testified at trial that three years before the murders she posed nude for Douglas. She was bound and gagged during the photo session and Douglas instructed her to look scared. A month later, Douglas asked her to help him make "snuff" films in which he would film the torture and murder of young women. (RT 2062-64.)

Douglas claims Phillips was given promises or inducements in return for her testimony which were not disclosed to the defense. She testified that she had been sentenced to four years in prison for burglary; she served two

and a half years and was released on parole. (RT 2074.) Douglas points to the fact that Phillips was paroled tour days before she testified at the preliminary hearing as evidence that a deal existed between Phillips and the prosecution.

Douglas has failed to allege any facts to support his contention. Habeas relief is not available on claims that are "conclusory and wholly devoid of specifics." Boehme v. Maxwell, 423 F.2d 1056, 1058 (9th Cir. 1970).

Even if the prosecution failed to disclose the existence of a deal, the evidence is not material. Evidence of promises or inducements could have been used to impeach Phillips. However, Peters effectively attacked her credibility at trial. Phillips was a heroin addict, she had engaged in prostitution, she allowed Douglas to photograph her in the nude and was not harmed, and she had been convicted of grand theft and burglary twice. (RT 2075, 2088, 2095, 2072-74.) Therefore, even assuming some kind of deal existed, there is no reasonable probability that, had it been disclosed to the defense, the result of the guilt phase would have been different. Claim 23(b) is DENIED.

For the same reasons, the related ineffective assistance of counsel claim (Claim 25(c)) is DENIED.

c. Claim 23(c) - References to Facts Not in Evidence

Douglas argues that the prosecutor committed misconduct at the guilt phase because he referred to the area where the victims were found as a "gravesite" and that he used the term "kill" instead of "snuff" when questioning Phillips. On federal habeas review, the Court does not ask whether the "prosecutor's remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1986) "'The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Williams v. Borg, 139

F.3d 737, 744 (9th Cir. 1998) (quoting Darden, 477 U.S. at 181).

Douglas argues that the prosecutor's use of the word "gravesite" was improper because the deputy coroner referred to the area where the bodies were found as an "animal hole." (RT 2263.) However, the deputy coroner later testified that the area was a gravesite. (RT 2266.) Therefore, the use of the word "gravesite" by the prosecutor was reasonable and supported by the evidence. In addition, the term was appropriate because Hernandez testified that he dug the hole and buried the victims' bodies in it. (RT 2551-57.)

During his questioning of Phillips regarding Douglas's plans to use her to help him film the torture of young women, Rackauckas asked, "And did [Douglas] say whether the girls or victims would be killed in the desert?" Phillips responded, "Yes, he did." Rackauckas then asked, "What did he say about that?" Phillips testified, "Well, he didn't -- he didn't say that word. But he -- he said 'snuff them,' which I took it as the same thing as kill." (RT 2064.)

Rackauckas committed no misconduct and did not misrepresent Phillips's testimony. He merely asked Phillips whether Douglas had talked about killing women on film. Phillips responded that, although he did not use the word "kill," she understood Douglas's use of the word "snuff" to mean that he intended to kill them.

Based on the foregoing, Claim 23(c) is DENIED. For the same reasons, the related ineffective assistance of counsel claim (Claim 25(g)) is DENIED.

d. Claim 23(d)- The Prosecutor Presented False and Misleading Testimony

Douglas claims Hernandez testified falsely at trial. He also argues that the prosecution knew or should have known that Hernandez's testimony was false and that the prosecution should have alerted the trial court or defense counsel of the

falsity. (Pet.at 59-60.)

The knowing use of false evidence by the State in a criminal prosecution violates due process. Giglio, 405 U.S. at 153. This rule applies equally when the State, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity. Id. at 153. "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the outcome of the trial." United States v. Polizzi, 801 F.2d 1543, 1549 (9th Cir. 1986). However, "inconsistency is not tantamount to perjury absent a showing of knowing falsehood." United States v. Flake, 746 F.2d 535, 539 (9th Cir. 1984).

Douglas points out several areas where Hernandez's testimony is inconsistent. (Pet. at 79-80.) These asserted inconsistencies include whether he had been to the murder site before the date of the murders, whether any shots were fired at the scene of the murders, and statements relating to the timing of various events. However, the inconsistencies in Hernandez's testimony identified by Douglas appear to be no more than that. Douglas has not alleged facts to support the contention that Hernandez's testimony was false or that the prosecution knew his testimony was false. Claim 23(d) is DENIED.

Claim 24 - Judicial Misconduct

Douglas argues that the trial court made prejudicial comments in the presence of the jury which violated his rights to a fair trial. (Pet. at 61.)

a. Underlying Facts

During the testimony of Jones's mother, the prosecutor was attempting to introduce circumstantial evidence of Jones's death. The prosecutor was asking Jones's mother where Jones's baby was in an attempt to show that Jones had not

attempted to get her baby back. Peters objected on relevancy grounds. The trial court sustained the objection and told the prosecutor, "Well, I think you know, counsel, by virtue of her dental work, Beth Jones is dead." (RT 2883.)

b. Applicable Law

Douglas would be entitled to relief on this claim if the trial court's comments "rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett, 67 F.3d at 740. The standard for reversing a verdict because of judicial misconduct is "rather stringent." Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 709 (9th Cir. 1989). "To sustain a claim of this kind, there must be an 'extremely high level of interference' by the trial judge which creates 'a pervasive climate of partiality and unfairness.'" Duckett, 67 F.3d at 740 (quoting United States v. DeLuca, 692 F.2d 1277, 1282 (9th Cir. 1982))

c. Discussion

Even assuming the trial court's comment was improper, it did not render the trial fundamentally unfair. The jury was provided with ample evidence regarding the death of Beth Jones, including evidence regarding dental records and Hernandez's testimony. The trial judge also instructed the jury not to consider any rulings he made, questions he asked, or statements he made to influence its opinion. (RT 3492-93.) Therefore, the judge cured any possible prejudice by instructing the jury and, had he not made the challenged statement, the result of the proceedings would not have been different. Claim 24 is DENIED.

Claim 25 - Ineffective Assistance of Counsel

Douglas alleges that he was denied the effective

assistance of counsel at the guilt phase. He raises 27 subclaims which he contends individually and cumulatively worked to deprive him of the effective assistance of counsel. Each subclaim is analyzed individually below. To prevail on an ineffective assistance of counsel claim, Douglas must satisfy the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, he must show (1) that his attorney's performance was deficient and (2) that prejudice resulted from the attorney's acts or omissions. Id. at 687. Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness. Id. at 688. Great deference is generally accorded the tactical decisions of trial counsel. Prejudice requires a showing that there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. Id. at 694.

a. Claim 25(d) - Failure to Investigate Defense Witnesses

Douglas contends that Peters was deficient in failing to interview and call a potential witness, Carl Mutter. Douglas claims Mutter, an inmate at Orange County Jail during his trial, would have testified that he saw one of the victims after the date of the murders. Mutter's testimony would have corroborated the testimony of another witness who testified that she saw the victims approximately six weeks after the date of the crimes. Douglas also contends Peters failed to adequately interview, investigate, and prepare defense witness Henry Akers. Akers testified that he talked to Douglas on the telephone at a time when Hernandez testified he and Douglas were on their way to the desert with the victims. (RT 3014-15.) Akers testified that he remembered the date and time of the phone call because he wrote a check to a fabric store during the phone call and later had his employee pick up the fabric. However, on rebuttal, the

prosecution called an employee of the fabric store who testified that Akers picked the fabric up himself and wrote the check out at the store. (RT 3235-40.) Douglas claims that Peters did not adequately investigate Akers's story or prepare Akers before he testified.

The Court held an evidentiary hearing on these claims.

After the penalty verdicts, Peters "became aware that Robert Carl Mutter declared under penalty of perjury that he saw Beth Jones alive after the date of her alleged disappearance." (Pet. Peters Direct at 3.) Peters sent his investigators to interview Mutter. However, he did not use the information obtained in that interview as a basis for a motion for new trial. Peters testified that, after talking to his investigators about Mutter, he "had absolutely no faith in Mr. Mutter as a credible witness. But I did have the investigators preserve his statement for some later use if somebody else wanted to reevaluate that credibility." (2/17 EH 167.)

The Court finds that Peters was not deficient in failing to use the information he obtained from Mutter as a basis for a motion for new trial. When Peters learned that Mutter might have relevant information, he interviewed Mutter. Based on the information he obtained, Peters determined that Mutter was not credible and made a strategic decision not to use him as the basis for a new trial motion. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. The Court will not second-guess Peters on the informed strategic decision not to use Mutter's testimony.

Peters also testified regarding his investigation of Akers. Peters read Akers's statement in the police reports, talked to Douglas about him, interviewed him twice in person, and talked to him several times on the phone. (2/17 EH 163.) Peters decided to use Akers as an alibi witness because the information Peters obtained from him was consistent with what he told the police, he was somewhat articulate, and he was

"emphatic that his story was right." (2/17 EH 164.) Peters also called Akers as a witness because, based on the strength of the prosecution's case, he felt he had nothing to lose. (2/17 EH 165.)

Based on the evidence presented at the evidentiary hearing it appears that Peters did not contact A-I Foam to determine if he could corroborate Akers's testimony. However, the Court's review of counsel's performance must be "highly deferential." Strickland, 466 U.S. at 689. It would be "all too easy for a court, examining counsel's defense after it had proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. In light of that presumption, the Court cannot say that the failure to foresee that the prosecution would obtain evidence to refute Akers's testimony was an error so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687.

Based on the foregoing, the Court DENIES Claim 25(d).[9]

---

9. Douglas also argues that Peters should have investigated Mike Lavesque, John Vasquez and Armando Bolanos, and witnesses who would have testified that Jones was seen at a gas station after the date of the murders. (Pet. at 68-69.) However, Douglas neither states how this evidence would have helped his case nor why Peters's performance was deficient. Douglas has presented no facts that would have led the jury to believe that he did not commit the crimes for which he was charged. The evidence presented provides only a very weak inference that someone else committed the murders and would not have refuted the evidence presented by the prosecution. "[I]neffective assistance of counsel claims . . . must be considered in light of the strength of the government's case." Eggleston v. United States, 798 F.2d 377, 376 (9th Cir. 1986). Therefore, the Court DENIES

b. Claim 25(e) - Peters Failed to Obtain Expert Testimony

The Court granted an evidentiary hearing on this subclaim. Douglas abandoned it before the hearing. (Petitioner's Memorandum of Contentions of Fact and Law at 67.) Therefore, Claim 25(e) is DENIED.

c. Claim 25(f) - Failure to Present Exculpatory Evidence

Anaheim police reports contained information that shell casings and expended rounds were found at the scene of the murders. Douglas asserts that Hernandez told the police that Douglas had fired a .22 caliber rifle at the scene, but at trial he testified that no shots were fired. Douglas contends that Peters should have investigated the Anaheim police reports to determine if the shells recovered were .22 caliber, and should have had a .22 rifle found at Douglas's shop test-fired and compared to the shell casings and expended rounds found at the murder scene. (Pet. at 71-72.)

It is unclear what the actions described above would have accomplished. the presence of shell casings and expended rounds several years after the crimes occurred does not prove or disprove anything material in the case. The prosecution did not allege that Douglas shot the victims. The presence of .22 caliber shell casings could only have been used to impeach Hernandez on a collateral issue. The evidence had no other value. That Peters did not take extraordinary steps to secure impeachment material on a minor collateral issue cannot defeat the presumption that his representation was reasonable. Claim 25(f) is DENIED.

---

these ineffective assistance subclaims.

d. Claim 25(i) - Failure to Object to Hearsay Testimony

During the guilt phase, Detective Johnson testified regarding a trip he took to the murder site with Hernandez and Rackauckas. Johnson testified that Hernandez led them to the murder site and pointed out where various events took place. (RT 2906-11.) Douglas claims Peters was deficient because he did not object to this testimony. (Pet. at 76.) This claim has no merit. Peters objected to Johnson's testimony on hearsay grounds. The trial court sustained the objection as to anything Hernandez said during the visit to the crime scene. (RT 2907.) The remaining testimony was not inadmissible hearsay. No out-of-court statements made by Hernandez during that visit were introduced. Johnson was asked only if Hernandez showed him where certain events took place. Peters cannot be considered ineffective for failing to object to admissible evidence. Claim 25(i) is DENIED.

e. Claim 25 (k) - Counsel Failed to Present Evidence That the State Destroyed Potentially Exculpatory Evidence

Douglas claims the Anaheim police deleted the surname of a suspect in the case from a report thereby destroying potentially exculpatory evidence. (Pet. at 78.) In support of this claim, Douglas refers to a page from an Anaheim police report. (EH Ex. 19.) The report contains a statement from Jones's brother, Ken, that he heard one of the victims mention the name "Doug." Immediately after the word Doug, there is a space of approximately one inch before the next word appears. The space occurs in the middle of a sentence. Douglas asserts that Peters was ineffective by failing introduce evidence that the State destroyed potentially exculpatory evidence by deleting the suspect's surname.

Douglas has failed to present evidence that the State

destroyed evidence and has failed to establish that the evidence was potentially exculpatory. He does not allege what evidence Peters should have found or that the evidence would have made a difference at trial. He has presented nothing to warrant relief on this subclaim. Habeas relief is not available on claims that are "conclusory and wholly devoid of specifics." Boehme, 423 F.2d at 1058. Claim 25(k) is DENIED.

f. Claim 25(l) - Failure to Adequately Cross-Examine

Douglas contends that Peters failed to attack Hernandez's credibility by cross-examining him on certain issues or by calling witnesses to challenge his testimony. (Pet. at 79-80.) Each of the alleged failures to adequately cross-examine Hernandez is analyzed separately below.

In the first instance of alleged ineffectiveness, Douglas contends that Peters should have cross-examined Hernandez about prior visits to the murder site. However, the Court cannot say that Peters provided deficient performance by failing to bring out this alleged inconsistency on a collateral matter. Whether Hernandez had been to the murder site before the murders or if he had only been on the road to the murder site is not the type of information that, had it been brought out, would have had an impact on the result of the proceeding.

In the second instance of alleged failure to contradict Hernandez's testimony, Douglas argues that Peters should have used a friend of Krueger's, Joni Green, to contradict Hernandez's testimony regarding a meeting between him, Douglas, and Krueger at a restaurant. To impeach Hernandez on this issue, Peters would have had to call Green as a witness to testify that she spoke with Krueger at the same date and time that Krueger was with Hernandez and Douglas. This was also a collateral issue. If Peters had shown that Krueger was not at the restaurant when Hernandez said she was, it would not have had an impact on the result of the proceedings. It is possible

that either Hernandez or Green were mistaken about the exact time or date. In fact, Hernandez testified that they went to the restaurant at noon or 12:30 and he did not remember exactly how much time they spent there. (RT 2681-82). It would have been difficult to effectively cross-examine Hernandez about an inconsistency relating to the timing of certain events when he was unsure about the timing of those events. Therefore, Peters was not deficient for failing to bring out this inconsistency and no prejudice resulted from counsel's omissions.

In the third issue, Douglas claims Peters should have presented the testimony of Douglas's business acquaintance, Jack Zimmerman, that he spoke with Douglas on the phone at a time when Hernandez testified that he and Douglas were on the road to the murder site.

At trial, in support of a motion to substitute Peters, Douglas asserted that Peters should have called Zimmerman to testify. Peters responded that he spoke with Zimmerman who said that he did not have a recollection of the conversation Douglas claims took place. Zimmerman could not testify that he spoke with Douglas in the morning on the date of the crimes. Peters also noted that Zimmerman was an alcoholic. (3(b) Supp CT 506-508.) Therefore, Peters made a reasonable strategic decision not to call Zimmerman as a witness at the guilt phase.

Based on the foregoing, Claim 25(1) is DENIED.

g. Claim 25(m) - Counsel Failed to Present Evidence Relating to Hernandez's Familiarity with Firearms

Hernandez testified that, before the victims were killed, Douglas handed him a rifle but that he did not take it because he was afraid of guns. (RT 2420.) Douglas contends that Peters was deficient by failing to call witnesses to testify to Hernandez's familiarity with or use of firearms. However, he identifies no witnesses who could have testified to Hernandez's familiarity with guns. Therefore, he has failed to establish that

Peters's performance was deficient. In addition, Douglas suffered no prejudice from the alleged deficiencies. Impeaching Hernandez on an inconsequential issue would not have affected the outcome of the trial. Claim 25(m) is DENIED.

h. Claim 25(o) - Counsel Failed to Cross-examine Teri Allmon Regarding Her Knowledge of a Potential Suspect

Douglas contends that Peters failed to present information contained in a letter indicating that an uncle of Don Hemmer, Krueger's boyfriend, stated in the presence of Teri Allmon, that he "liked to cut up and rip up girls just for the hell of it." (Pet. at 83-84.) Douglas also claims the letter indicated that Allmon and her husband suspected that Hemmer's uncle killed the victims.

Peters did not provide deficient performance by failing to cross-examine Alimon about the letter in question. First, under California law, evidence of the guilt of a third party is admissible only if there is "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." People v. Hall, 41 Cal.3d 826, 833, 226 Cal.Rptr. 112 (1986). The information contained in the letter at issue is neither direct nor circumstantial evidence that Hemmer's uncle actually murdered Jones and Krueger. The information is too general to be considered "substantial evidence tending to directly connect" Hemmer's uncle to the crime. Id. Second, Peters would have had to overcome a hearsay objection from the prosecution. The information contained in the letter does not appear to satisfy the requirements to be admissible as a declaration against interest. See California Evidence Code § 1230. The information contained in the letter probably would have been excluded, therefore, Peters's performance was not deficient.

Douglas also suffered no prejudice from Peters's failure to cross-examine Allmon regarding the letter. There was no evidence that the uncle might have committed the crimes for

which Douglas was convicted and the case against Douglas at the guilt phase was very strong. Claim 25(o) is DENIED.

i. Claim 25(D)- Failure to Impeach Dana Lee's Testimony

Douglas claims Ken Jones, Beth Jones's brother, told Anaheim police that on August 8, 1982, he heard Krueger ask Jones if she wanted to make some money taking nude photographs. (See EH Ex. 19.) This conversation took place during a trip to Hollywood and the information is consistent with Dana Lee's testimony about a similar conversation that took place between the victims during a ride to Hollywood. However, Ken Jones stated that the conversation took place three days before Lee introduced Krueger to Douglas. Douglas claims this information casts doubt on the inference that the victims' conversation referred to him. He contends that Peters should have called Ken Jones as a witness.

The Court held an evidentiary hearing on this subclaim. At the I hearing, Peters testified that he had "no recollection of focusing on that issue or seeing the discrepancy between the police report which states the events happened on Sunday and the live testimony that those events happened on Wednesday." (Resp. Peters Direct at 11.)

Douglas is not entitled to relief on this subclaim as he has failed to establish prejudice. The prosecution established that Douglas met the victims through Lee and Hernandez's testimony. Although Peters vigorously attacked Hernandez's credibility, the jury clearly believed the substance of his testimony -- that Douglas murdered Jones and Krueger. If Peters had brought out the inconsistencies between Ken Jones and Lee's statements, there is no reasonable probability that the result of the guilt phase would have been different. Ken Jones's testimony would have impeached Lee on a minor point that could have been easily explained away as an innocent misrecollection. Claim 25(p) is DENIED.

j. Claim 25(q) - Failure to Evaluate Medical Condition

Douglas claims Peters failed to investigate and present evidence that he has physical ailments which would have made it impossible for him to perform the acts described by Hernandez at trial. (Pet. at 86.)

Douglas abandoned this subclaim before the evidentiary hearing. (Petitioner's Memorandum of Contentions of Fact and Law at 67.) Claim 25(q) is DENIED.

k. Claim 25(r) - Failure to Investigate and Present Mental State Evidence

Douglas claims Peters failed to conduct an adequate investigation to determine whether a mental state defense was viable. (Pet. at 87-90.) The Court held an evidentiary hearing on this subclaim.

i. *Applicable Law*

Trial counsel has a duty to adequately investigate a capital defendant's mental state if there is evidence to suggest that the defendant is impaired. Bean v. Calderon, 163 F.3d 1073, 1078 (9th Cir. 1998); see also Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (counsel's failure to pursue the possibility of establishing his client's mental instability constituted deficient performance); Seidel v. Merkle, 146 F.3d 750, 756 (9th Cir. 1998) (trial counsel found ineffective for failing "to conduct even a minimal investigation in order to make an informed decision regarding the possibility" of a mental state defense); Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (counsel has a duty "to seek out psychiatric evaluation of a client where the grounds of a mental defense are apparent").

ii. *Facts Presented at Evidentiary Hearing*

(a) *Mental health investigation*

At the evidentiary hearing, Peters testified regarding his guilt phase investigation into Douglas's mental state. Peters was appointed to represent Douglas on March 8, 1984. He had two investigators appointed to assist him: Alfredo Rasch and Robert Hallihan. (Pet. Peters Direct at 3.) He was also assisted by a second attorney who concentrated on motions and research: first, Robert App, and then Michael Geary. (Resp. Peters Direct at 3.)

Peters recognized that a mental state defense might be viable. (2/18 EH 16.) Therefore, he had a psychiatrist, Dr. Kaushal Sharma, and a psychologist, Dr. Martha Rogers, appointed to assist him. Drs. Sharma and Rogers were instructed by Peters "to see if there was anything of a psychological nature [he] could use. And specifically [they] talked about, of course, competency or any other severe mental conditions that might be useful either in defending Mr. Douglas or mitigating what could happen to him if he got convicted." (2/18 EH 8.) However, the mental health experts were directed to address themselves primarily to Douglas's claims of claustrophobia because that "was something Douglas wanted to get [] done first, so it was a priority." (2/17 EH 175.)

To assist the experts, Peters gathered some information from Douglas about his background. He also obtained information about Douglas's background from the discovery he received relating to the 1977 crimes and from Douglas's wife. (2/18 EH 11.) Peters provided this background material to the experts. (2/18 EH 10.)

Dr. Rogers interviewed Douglas for a total of approximately seven hours and administered several psychological tests, including the Minnesota Multiphasic Personality Inventory ("MMPI"), Rorschach, psychological social history questionnaire, Milan Clinical Multiaxial

Inventory ("MCMI"), Sack's completion test, Hooper visual organization test, and a Mooney problem checklist. (2/19 EH 99.) However, her primary objective was to address Douglas's claustrophobia and not to conduct a comprehensive psychological assessment. (2/19 EH 118-19.) Nevertheless, Dr. Rogers did a "general screening to look at the possibility of other issues" and, after the testing and clinical interview, she found no indication of a major mental disorder. (2/19 EH 118, 108.)

After considering the information obtained from Peters and interviewing Douglas in person, neither Dr. Sharma nor Dr. Rogers found evidence of psychosis or incompetency. (2/17 EH 162-63.) Dr. Rogers suggested that further testing could be done and Peters "wanted to do additional work both to see if there was some possibility [Douglas's mental state] played some role in the guilt phase and [he] certainly wanted to see if [he] could develop something for a penalty phase." (2/18 EH 37.) However, after Douglas obtained a separate cell to lessen the impact of his claustrophobia, he refused to cooperate further with either Dr. Sharma or Dr. Rogers in the preparation of a mental state defense. (2/18 EH 35-40.) Therefore, Peters did not present a mental state defense at the guilt phase. (2/17 EH 162.) Instead, he presented an alibi defense.

(b) *Evidence that could have been presented*

At the evidentiary hearing, Douglas presented the testimony of Dr. Louis Broussard, Dr. James Rosenberg, Dr. Wilfred Van Gorp, and Dr. Dale Watson on the issue of his mental state at the time of the murders. The State presented the testimony of Dr. Rogers in rebuttal.

Dr. Louis Broussard

Dr. Broussard, a psychologist, was retained to evaluate Douglas in 1977. (Updated Narrative Statement of Dr.

Broussard ["Broussard Decl."] at ¶ 7.) Dr. Broussard interviewed Douglas in 1977 and administered the following psychological tests: the Peabody Picture Test, the Bender Visual Motor Gestalt Test, and the Rorschach Test. (Broussard Decl. at ¶ 11.) He concluded that Douglas "was suffering from serious and outstanding mental illness and possible organic impairment." (Broussard Decl. at ¶ 8.) Douglas's "thought processes were chaotic and lack basic organization" and "were so impaired that he was unable to understand the reasons why these complex events, such as the criminal charges against him, occurred." (Broussard Decl. at ¶ 9.) The test results and Douglas's background "suggested some level of pre-existing neurological deficit that may have interacted with insults to the brain that he suffered later in life due to chronic alcoholism, the near constant exposure to solvents from his work and a serious automobile accident in 1967." (Broussard Decl. at ¶ 12.) Dr. Broussard informed Douglas's attorney in 1977 that he did not have the mental capacity to plan and execute the actions with which he had been charged and was not competent to stand trial. (Broussard Decl. at ¶ 14, 15.)

Dr. Broussard evaluated Douglas again in 1994 at the request of his federal habeas attorneys. He noted that, in 1977, Douglas was "dirty, grimy and unkempt," while in 1994, he was "clear-eyed and his speech was not slurred." (Broussard Decl. at ¶ 10, 18.) Dr. Broussard opined that the "elimination of his chronic exposure to alcohol and to industrial solvents for the past ten years most likely caused the improvement of his present appearance and demeanor." (Broussard Decl. at ¶ 19.) Despite his improved appearance, Douglas "described a well organized and elaborate delusional system." (Broussard Decl. at ¶ 20.) Dr. Broussard considered information regarding Douglas's background and medical history provided by his federal habeas attorneys and concluded that Douglas "suffers from serious mental impairments, including paranoid, delusional, and psychotic mental states whose etiology is difficult to determine with certainty, but most likely is the result of organic as well as

psychiatric disease. Mr. Douglas most likely suffers from brain damage from chronic alcoholism and exposure to neurotoxins?" (Broussard Decl. at ¶ 26.)

Dr. Rosenberg

Dr. Rosenberg is a psychiatrist who was retained to "determine whether Mr. Douglas' mental functioning and status at the time of the offense for which he was convicted were impaired in any way such that he was unlikely to have the ability to form the required mental state of deliberation and premeditation." (Updated Narrative Statement of Dr. Rosenberg ["Rosenberg Decl."] at ¶ 10.) In forming his opinion, Dr. Rosenberg reviewed reports and data from the other mental health experts, Douglas's social history, medical records, and military records. (Rosenberg Decl. at ¶ 11.)

Dr. Rosenberg opined that Douglas's "extensive history is suggestive of diffuse, temporal lobe and frontal lobe brain damage." His opinion is based on "chronic solvent exposure, alcoholism, and evidence of head traumas." (Rosenberg Decl. at ¶ 13.) Damage to the frontal or temporal lobes "can produce a characteristic pattern that includes impulsive behavior, paranoid delusions, hyper sexuality, poor judgment, social disinhibitions, phobias and other anxiety syndromes as well as more specific sexual deviations such as sadism." (Rosenberg Decl. at ¶ 29.) In addition, the brain damage "may well have impaired Mr. Douglas' ability to appreciate the criminality of his conduct, to conform his conduct to the requirements of the law, and his ability to form the requisite mental state for first degree murder." (Rosenberg Decl. at ¶ 32.)

Dr. Rosenberg also opined that Douglas "suffers from a schizo-affective disorder, bi-polar type, and suffered from this mental illness at the time of his trial in 1984." He concluded that Douglas did not have the "capacity in light of this mental illness, to form the necessary mental state for" first degree

murder. (Rosenberg Decl. at ¶ 15.)

Dr. Van Gorp

Dr. Van Corp is a neuropsychologist. He was retained to provide an opinion on Douglas's "ability to form the mental state required for capital murder including deliberation and premeditation." (Updated Narrative Statement of Dr. Van Gorp ["Van Gorp Decl."] at ¶ 13.) To provide such an assessment, Dr. Van Corp interviewed Douglas, reviewed "a substantial quantity of medical and court records," and administered a "comprehensive battery of neurocognitive tests." (Van Gorp Decl. at ¶ 14.)

Dr. Van Gorp found evidence "consistent with dysfunction of the central nervous system, especially to the fronto-temporal area." (Van Gorp Decl. at ¶ 15.) He opined that Douglas "has long-standing neurocognitive dysfunction consistent with central nervous system impairment." (Van Gorp Decl. at ¶ 16.) He noted that Douglas "has a clear disturbance in his thinking including significant paranoia." (Van Gorp Decl. at ¶ 18.) Finally, Dr. Van Gorp stated that Douglas's symptoms "raise the possibility of a distinct personality pattern that has been associated with a temporal lobe seizure disorder." (Van Gorp Decl. at ¶ 21.)

Dr. Watson

Dr. Watson is a neuropsychologist and was retained to evaluate Douglas and to "determine if neuropsychological dysfunction or deficits were present and to specify the degree, nature and effect of any such impairments." (Updated Narrative Statement of Dr. Watson ["Watson Decl."] at ¶ 7.)

Dr. Watson concluded that Douglas "apparently suffers from an organic brain/psychiatric syndrome most likely due to his chronic and long term exposure to industrial solvents and/or multiple head injuries." In addition, Douglas "suffers

from serious cognitive impairments, such as memory problems and attention/ concentration deficits." (Watson Decl. at ¶ 9.) Dr. Watson opined that these impairments are "relevant to determinations of Mr. Douglas' ability to form the requisite mental state for first degree murder, whether these impairments undermined Mr. Douglas' capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law, and whether he suffered extreme mental and emotional disturbance." (Watson Decl. ¶ 9.)

Dr. Rogers

Dr. Rogers reviewed the test data compiled by Dr. Van Gorp and compared his findings with the tests she administered to Douglas in 1984. The results of the MMPI tests given in 1997-98 and 1984 were consistent, and the results of the 1997-98 MMPI test showed that "he had a lot of psychosomatic or somatic complaints. He engaged in a good deal of denial as apparently a personality style; he was depressed; there were sortie signs of anxiety . . . . And other measures of possible fault disruption or unusual thinking patterns or hypomanic or changes in affect, those were largely not significant." (2/19 EH 106.)

Dr. Rogers also compared Douglas's 1984 Rorschach scores with a 1997 Rorschach test. She concluded that the results "were not consistent with a major mental disorder." (2/19 EH 107.)

iii. *Discussion*

An attorney has a duty to conduct a reasonable investigation. Ames v. Endell, 856 F.2d 1441,1444 (9th Cir. 1988). Counsel must "at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). The Court must find that counsel

either conducted a reasonable investigation or demonstrated a strategic reason for failing to do so. Id. However, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

Peters recognized the possibility of presenting a mental state defense and arranged for two mental health experts to be appointed to assist him. Although it appears that Drs. Rogers and Sharma were directed to primarily assess Douglas's claustrophobia, they were also asked to perform "a general screening to look at the possibility of other issues." (2/19 EH 118.) Both experts interviewed Douglas and Dr. Rogers administered various psychological tests. Neither expert found evidence of a major mental illness.

Although he had received nothing from his experts to suggest that a mental state defense was viable and he himself saw no evidence of major mental illness, Peters wanted to pursue the issue further. Douglas, however, refused to cooperate with the experts after he obtained their assistance for claustrophobia. Peters attempted to dissuade Douglas, but Douglas was "absolutely adamant that . . . there was nothing wrong with him, that he hadn't done this crime, he wanted to focus on the guilt phase, he wanted nothing to do with the psychiatric defenses of any sort." (2/17 EH 182.)

The Court finds that, in light of all the circumstances, the failure to further investigate and present a mental state defense at the guilt phase was not "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Peters conducted a preliminary investigation into possible mental state defenses. (2/18 EH 14.) He retained a psychologist and a psychiatrist to provide a general assessment of Douglas's mental state. Neither expert found any evidence of major mental illness. Peters was entitled to rely on this information in deciding whether to further pursue a mental state defense. See Moran v. Godinez, 57 F.3d 690, 699-70 (9th Cir. 1994).

Douglas's subsequent failure to cooperate with Peters and the mental health experts made it difficult for Peters to conduct a more extensive investigation into his mental state. Moreover, Douglas insisted that he was innocent and wanted to present an alibi defense which would have contradicted a mental state defense. Based on these facts, the decision to present an alibi defense and to forego further investigation of a mental state defense at the guilt phase was reasonable.

The Court is somewhat troubled by the fact that Peters did not consider and follow up on Dr. Broussard's conclusion that Douglas was incompetent and suggestion that he did not have the capacity to premeditate and deliberate in 1977. Peters reviewed the 1977 court file and interviewed Douglas's prior attorney, therefore, he should have been aware that Dr. Broussard had provided an assessment of Douglas's mental state. (2/18 EH 53.) Peters stated that he had never heard of Dr. Broussard and that he would have been interested "in obtaining any psychological data on Mr. Douglas in preparation for trial." (Pet. Peters Direct at 8.)

Peters made a mistake in failing to uncover Dr. Broussard's assessment of Douglas's mental state and in failing to provide this information to Drs. Rogers and Sharma. However, Douglas is not entitled to a perfect trial. See Williams v. Calderon, 52 F.3d 1465, 1485 (9th Cir. 1995). Peters's failure did not so undermine "the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. The investigation of mental state evidence at the guilt phase was reasonable.

Douglas also complains that Peters failed to investigate his background to assist the experts. While obtaining information regarding a client's background and mental health history is good practice, trial counsel does not have a duty at the guilt phase "to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert." Hendricks, 70

F.3d at 1038. Part of the skill of an expert is to recognize what information he needs in order to render an opinion. Id. "To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert." Id. at 1039. Therefore, Peters's failure to obtain information relating to Douglas's background did not render his investigation into potential mental state defenses inadequate.

Douglas has also failed to establish prejudice. None of the experts retained by Douglas provided compelling evidence of a mental disorder which would have rendered Douglas unable to premeditate and deliberate or which would have substantially diminished his capacity to premeditate and deliberate.

Dr. Rosenberg testified that Douglas's brain damage "*may well have* impaired Mr. Douglas' ability to appreciate the criminality of his conduct, to conform his conduct to the requirements of the law, and his ability to form the requisite mental state for first degree murder." (Rosenberg Decl. at ¶ 32) (emphasis added.) He also testified that Douglas did not have the "capacity in light of this mental illness, to form the necessary mental state for what I understand to be first degree murder." (Rosenberg Decl. at ¶ 15.) However, Dr. Van Gorp testified that individuals with the type of impairment exhibited by Douglas would be able to form the intent to murder and premeditate. (2/18 EH 83.) Dr. Van Gorp also testified that Douglas was capable of planning and carrying out all of the actions attributed to him by Hernandez. (2/18 EH 72-73.) Dr. Watson testified that Douglas had certain impairments, but did not testify that Douglas was unable to form the intent to kill. (2/18 EH 135-36.)

In sum, the mental health experts who testified at the evidentiary hearing did not provide persuasive evidence that Douglas was suffering from a mental disease or defect that, in 1982, rendered him unable to premeditate and deliberate or

substantially diminished his capacity to premeditate and deliberate. Dr. Rosenberg testified that Douglas could not form the necessary mental state for first degree murder. However, his opinion was conclusory and not supported by specific facts. Dr. Van Gorp could only say that Douglas's mental state "probably was a factor that [] should be incorporated into understanding the crime." (2/18 EH 82.) Dr. Watson gave no opinion regarding Douglas's mental state at the time of the crimes. The Court gives more weight to the testimony of Dr. Rogers who interviewed Douglas in 1984 and found no evidence of a major mental disorder, and finds that Douglas has failed to establish that a viable mental state defense could have been presented at the guilt phase.

Dr. Broussard testified that Douglas did not have the mental capacity to plan and execute the actions with which he had been charged in 1977 and was not competent to stand trial. (Broussard Decl. at ¶ 14-15.) However, the Court gives Dr. Broussard's testimony little weight. His conclusions that Douglas was not legally sane and not competent to stand trial in 1977 are inconsistent with the empirical evidence. For instance, Dr. Broussard testified that Douglas was "totally inadequate to cope with the structure of reality," and that he was not capable of running a business, giving estimates, filling orders, delivering refinished furniture, and collecting money for work performed. (2/17 EH 138, 149-50.) However, evidence was presented at the evidentiary hearing that Douglas was doing all of those things. (See 2/17 EH 60-62, 31, 36; 2/18 EH 123.)

Based on the foregoing, Claim 25(r)is DENIED.

1. Claim 25(s) - Conflict of Interest

Douglas was represented by Phillip App for a short period of time before trial. App was appointed in municipal court to assist Peters. However, at the arraignment, App informed the court that a conflict has arisen between himself and Douglas and that he wanted to be relieved as co-counsel.

(PT 3-5.) Douglas was present during this discussion. App informed the court that he would assist Peters in preparing pre-trial motions, but would not have any personal contact with Douglas. App was then relieved as co-counsel. Mike Carey was later appointed as second counsel. Douglas contends that App represented him on various pre-trial motions and that the conflict rendered App incapable of effectively representing him.[10/]

Douglas would be entitled to relief if he could show that App had an actual conflict of interest which adversely affected his performance. Cuyler,446 U.S. at 335. However, Douglas has failed to allege sufficient facts to show that he is entitled to relief on this claim. He has failed to allege the nature of the conflict of interest which forced App to be relieved. The record shows that, at the pre-trial hearings, Douglas was represented by Peters and Carey. There is no indication that App had any contact with Douglas or represented him in any way until after the guilt phase. In addition, Douglas was informed that App would be working on his case behind the scenes and he failed to object. Finally, Douglas has failed to state facts alleging that the claimed conflict adversely affected App's performance. Therefore, this subclaim is DENIED.

Claim 26 - Trial Court Error

Douglas argues that the trial court erred "in allowing the jury to rely on the uncorroborated testimony of accomplice Hernandez, and giving conflicting instructions on how to treat such testimony." (Pet. at 91-92.)

---

10. App appeared on Douglas's behalf at a motion to exclude evidence brought after the guilt phase but before the penalty phase. The court raised the issue of the conflict and Douglas expressly waived any conflict. (RT 3524.)

This claim has two parts. First, pursuant to California Penal Code § 1111, a conviction cannot be based on the uncorroborated testimony of an accomplice. Douglas argues that Hernandez was an accomplice and that there was insufficient independent evidence to corroborate his testimony. Second, Douglas argues that the court gave the jury conflicting and confusing instructions on how to deal with accomplice testimony.

This claim raises an issue of the application of state law and an issue of instructional error. As discussed above, a claim of a violation of state law is not cognizable on federal habeas review unless Douglas can show that the error rendered his trial fundamentally unfair. A claim of instructional error will be granted only if "the ailing instruction so infected the entire trial that the resulting conviction violates due process." McGuire, 502 U.S. at 72 (quoting Cupp,414 U.S. at 147).

Douglas has failed to establish that the trial was fundamentally unfair. First, there was sufficient evidence to connect him to the commission of the murders to corroborate Hernandez's testimony. See Douglas, 50 Cal.3d at 507. Second, the Court agrees with the California Supreme Court's holding that the instructions given to the jury did not lead it "to disregard the instruction on the requirement of corroboration for the testimony of an accomplice." Id. at 508. Therefore, Claim 26 is DENIED.

Claim 27 - Unconstitutional Reasonable Doubt Instruction

Douglas argues that the definition of reasonable doubt given to the jury violated his constitutional rights. (Pet. at 94-95.)

Claim 27 is DENIED. The reasonable doubt instruction given at trial is constitutional. Victor v. Nebraska, 511 U.S. 1, 22-23 (1994).

C. PENALTY PHASE CLAIMS

Claim 1 - Ineffective Assistance of Counsel at Penalty Phase

Douglas has raised several claims of ineffective assistance of counsel at the penalty phase. These subclaims are addressed individually below.

a. Claim 1(a) - Failure to Conduct Effective Voir Dire

Douglas contends that Peters failed to comprehend and explain to the jury venire the process by which they were to determine the penalty in a capital case. (Pet. at 100-01.) Douglas argues that Peters improperly described the process as a mechanical one of counting aggravating and mitigating factors.

The Court reviewed the alleged instances of deficient performance during voir dire and finds that this subclaim is without merit. The jury was instructed that it was to weigh the aggravating and mitigating circumstances. (RT 3960.) It was further instructed that any circumstance in mitigation could, standing alone, be sufficient to justify a sentence of life without the possibility of parole. (RT 3960.) Finally, the jury was instructed that, if it concluded that the aggravating circumstances outweighed the mitigating circumstances, "you shall impose a sentence of death." (RT 3962.) Peters's statement to the jury that "if the aggravation outweighs the mitigation, you should impose the death penalty" (RT 639), and similar comments were consistent with the instructions given by the court. Peters did not provide deficient performance by properly informing the jurors regarding their duties at the penalty phase. Claim 1(a)is DENIED.

b. Claim 1(c) - Counsel Failed to Present Evidence of Third-Party Culpability

Douglas argues that Peters should have introduced evidence of a physical description given by Krueger of an individual who asked to take nude photos of her. Douglas contends this description was inconsistent with his. Krueger gave the description to her friend, Joni Green, who recorded it in her diary. Douglas also contends that Peters should have elicited evidence from various witnesses that a man with a description inconsistent with his had been seen with one or both of the victims before and after the murders. (Pet. at 104.)

Even assuming Peters was deficient in failing to introduce the evidence in question, Douglas has not established prejudice. Peters had already introduced evidence that the victims were seen after the date of the murders. The jury did not believe the defense witnesses and the prosecution presented ample evidence of Douglas's guilt. There is no reasonable probability that, had the evidence Douglas identifies been introduced at trial, the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Claim 1(c) is DENIED.

c. Claim 1(d)- Counsel Failed to Investigate and Present Mitigating Evidence

At the penalty phase, Peters presented the testimony of four witnesses -- Douglas's wife, son, neighbor, and friend. These witnesses testified to his general good character. Peters, without putting on any mental state evidence, argued to the jury that Douglas had probably suffered sexual abuse as a child and had a "demon" living inside him. Douglas claims that Peters failed to adequately investigate and present evidence regarding his childhood, background, possible mental impairments, and military service. (Pet. at 105-08.) The Court held an

evidentiary hearing on this claim. The failure to present available mitigating evidence at the penalty phase is a valid basis for an ineffective assistance of counsel claim. To "fail to present important mitigating evidence in the penalty phase -- if there is no risk in doing so -- can be as devastating as a failure to present proof of innocence in the guilt phase." Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1990). Presenting evidence of a defendant's background and character can be especially helpful because of "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Douglas must also establish that the failure to present mitigating evidence resulted in prejudice. Prejudice is shown when there is a reasonable probability that, absent the errors, the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

1. *Penalty Phase Investigation*

Peters's primary source of information about Douglas's background was Douglas himself. Peters and his two investigators interviewed Douglas to obtain information regarding his childhood and background and to obtain the names of other persons they could contact. Douglas provided some useful information, including that he was an orphan, that as a child he had been locked in a closet by a elderly caretaker, and that he had joined the Marines at age 15. The defense team also obtained information about Douglas's background from interviews with his son and wife. (See 2/19 EH 84-86; EH Ex. 2) The investigators attempted to locate friends of Douglas who could testify as character witnesses on his behalf. (EH Exs. 2, 24, 30.) Peters also obtained military service records, attempted

to subpoena mental health records, and obtained the file from Douglas's 1978 conviction.

ii. *Evidence Presented at the Penalty Phase*

At the penalty phase, Peters called four witnesses to testify: Julio Sierra, Mark Douglas, Gloria Douglas, and Floyd Larson.

Julio Sierra had been Douglas's neighbor since January 1975. (RT 3761.) He testified that their apartment was clean and neatly kept, and that the "Douglases has been for me as fine a set of neighbors as one can have. They have been quiet neighbors, helpful when I've needed them." (RT 3762.) Sierra had never seen Douglas drunk or acting loud and obnoxious.

Mark Douglas is petitioner's son. He testified that he and Douglas had a decent father-son relationship and they "did a lot of activities together." (RT 3766.) Douglas taught him the furniture refinishing trade, was a hard worker, and was well-respected in the business. (RT 3767-69.)

Mark testified that Douglas was not violent and could not handle the sight of blood. (RT 3768-69.) He also testified that Douglas was an orphan. (RT 3770-71.)

On cross-examination, Mark testified that Douglas ran away from home and enlisted in the Marine Corps when he was 14 or 15. (RT 3772.) Douglas was not in combat and, according to Mark, he was responsible for setting up recreational activities. (RT 3785.)

At the time he testified at trial, Floyd Larson had been friends with Douglas for 30 years. (RT 3788.) He saw Douglas and his family two or three times a week. Larson did not think Douglas was capable of killing anyone and Douglas did not like the sight of blood. (RT 3789-90.) Larson testified that, although Douglas was a big talker, he was not violent person. Larson also noticed that Douglas bought large quantities of food which he presumed had something to do with deprivation as a child. (RT 3791.) Douglas would also buy food for needy people

during the holidays. (RT 3792.)

Gloria Douglas testified that she married Douglas in 1951. He was in the Marine Corps when she met him and was honorably discharged as a sergeant. (RT 3806.) After he left the Marines, Douglas and Gloria lived in Illinois where he began working as a furniture refinisher. He eventually bought the business where he worked. (RT 3807.) Douglas was a very hard worker and he owned several furniture refinishing shops and bars in Orange County. (RT 3811-12.) He always provided for his family and was a good father. (RT 3815.) He was not a violent person, had never been in a fight, and had never struck her. (RT 3823.)

Gloria also testified that Douglas was an orphan and lived with several families before eventually living with the Douglases. (RT 3816-18.) He was not happy with any of these families and left home at an early age to join the Marine Corps. He had to obtain a false birth certificate to join because he was under age. (RT 3817.)

Gloria testified that Douglas was "too generous" and that people took advantage of him because he was always buying food for people and giving them money. He also bought food by the case and kept a cabinet constantly stocked with food. She thought he did this because of an experience from his childhood. (RT 3817.)

According to Gloria, Douglas would become nauseated at the sight of blood. (RT 3811.) He also had several physical problems. He had gout which sometimes would become so severe that he would have to use crutches and he had a shoulder injury that prevented him from raising his arms up past his shoulder. (RT 3824.)

On cross-examination, Gloria testified that Douglas left the family in August 1982, and she did not see him again until she testified at trial. (RT 3829-30.)

iii. *Additional Evidence That Could Have Been Presented*

At the evidentiary hearing, Douglas presented the testimony of several friends and relatives regarding his background and character. He also presented the testimony of Frank Barnett, a clinical social worker who prepared a social history of Douglas. Finally, he presented the testimony of the mental health experts whose testimony was discussed in relation to Guilt Claim 25(r).

The evidence Douglas claims should have been presented is summarized below.

Background and Character Evidence

As a young child, Douglas was abandoned by his mother and was raised by various families in Chicago. He was raised for a time by an elderly alcoholic who locked Douglas in a closet when he left the house. (Barnett Direct at ¶ 12.) Douglas was raised in an area of Chicago known as the "Back of the Yards." This area was impoverished and the residents lacked proper sanitation and health care. Douglas had to scavenge for food in garbage cans to get enough to eat. (Barnett Direct at ¶ 14.) When he was approximately eight years old, Douglas went to live with his mother, Clara, and his step-father, Leroy Douglas. (Barnett Direct at ¶ 11.) Leroy was an alcoholic, was sexually abusive towards his step-daughter, and had an interest in pornography. (Sisk Direct at ¶ 12, 13.) Clara was physically and emotionally abusive. (Etapa Direct at ¶ 5; Sisk Direct at ¶ 3.)

Douglas attended high school in Chicago but dropped out at 15 to join the Marines. He had problems reading and was embarrassed about his learning disabilities. (Bailey Direct at ¶ 3.)

While waiting to join the Marines, Douglas was arrested for vagrancy and placed in a Florida jail where he was

beaten and raped by other inmates. (Etapa Direct at ¶ 8.) After being released from jail, he returned to Chicago and joined the Marines in 1945. He was able to join the Marines at age 15 by obtaining a false birth certificate. (Etapa Direct at ¶ 7.) While in the military, Douglas was stationed in China where he recalled experiencing extra-sensory powers. (Barnett Direct at ¶ 87.) He was later stationed at the El Toro Marine Air Base where his duty was to clean spark plugs using carbon tetrachloride which has been shown to cause disorders of the nervous system. (Barnett Direct at ¶ 89.) In 1949, Douglas received an honorable discharge. He reenlisted in 1951, was promoted to sergeant, and served as a Special Services Assistant. He was honorably discharged a second time in 1952. (Barnett Direct at ¶ 91, 94.) During his military service, Douglas earned the following medals and commendations: American Campaign Medal; China Service Medal; Asiatic-Pacific Campaign Medal; Presidential Unit Citation; Navy Unit Commendation; Good Conduct Medal; World War II Victory Medal; and National Defense Service Medal. (EH Exs. 73, 75, 76.) He also helped save two sailors who were in danger of drowning while stationed in California. (Barnett Direct at ¶ 90.)

After his military service, Douglas started working in the furniture refinishing business where he was exposed to toxic solvents and chemicals. (Barnett Direct at ¶ 95.) Mark Douglas was born in 1955 and the family moved to California. In 1967, Douglas was involved in a serious automobile accident in which he was ejected through the windshield. (Barnett Direct at ¶ 101.) He suffered a concussion and EEG results were "mildly abnormal, showing left central occipital intermittent state of slowing." (EH Ex. 65 at 3.)

Douglas changed after the accident. He became "very stressed or on edge." (2/18 EH 124). His wife started to take care of the books for the business and he hired an outside estimator to estimate the cost of jobs. (2/18 EH 121, 123.) He also became more irritable, restless, complained of feeling dizzy, and began to depend on others more heavily. (2/17 EH

51-52, Gloria Douglas Direct at ¶ 15-17.)

From 1966 to 1977, Douglas consumed "an enormous amount of alcohol" on a daily basis. (Leavy Direct at ¶ 2.) While working, he used various stains, thinners, solvents, and other chemicals that emitted strong vapors. (Mark Douglas Direct at ¶ 5.) He did not use ventilators, gloves, or any other type of safety device. (Mark Douglas Direct at ¶ 8.) Sometimes these chemicals would be absorbed through the skin and other orifices and caused "horrible headaches." (Mark Douglas Direct at ¶ 6.)

Mental State Evidence

The mental state evidence that Douglas contends should have been presented at the penalty phase is essentially the same evidence discussed in relation to the alleged failure to introduce mental state evidence at the guilt phase. The Court will not restate that evidence here. However, the experts also testified specifically regarding the relevance of the mental state evidence at the penalty phase. In addition, Barnett testified regarding the possible impact of Douglas's upbringing on his mental health.

Dr. Rosenberg testified that Douglas's mental disease should have been presented as a mitigating factor at the penalty phase. He stated that "a thorough and careful psychiatric examination coupled with competent and reliable psychological testing would have provided defense counsel with a significant basis for the argument presented to the penalty phase jury that Mr. Douglas indeed suffered . . . from an extreme mental illness." (Rosenberg Decl. at ¶ 15.) Dr. Rosenberg also testified that Douglas's sexual assault as a young man in jail "could easily lead to a loss of normal sexual relations or the replaying of the assaults through violence and sexual deviation such as bondage and sadism." (Rosenberg Decl. at ¶ 30.)

Dr. Van Gorp testified that Douglas "has long-standing and significant neuropsychological impairment and

psychiatric disease that should have been presented to the jury as mitigation evidence." (Van Gorp Decl. at ¶ 13.) He also testified that Douglas's psychological impairments, while not directly causing him to commit the crimes, are "a factor that[] should be incorporated into understanding the crimes." (2/18 EH 82.)

Finally, Barnett testified that,

> the traumatic effects of an unsettling early childhood upbringing such as Mr. Douglas's cannot be underestimated. First, being an orphan as an infant and experiencing the lack of a parental bond can seriously retard the emotional developmental process. Second, if an infant or young child is not provided with an adequate substitute parental figure to supply a nurturing experience--and Mr. Douglas most likely did not have such a parental figure--that child can potentially suffer from long lasting psychological effects.

(Barnett Direct at ¶ 9.)

iv. *Discussion*

There are two questions the Court must answer to analyze this subclaim. First, does Peters's failure to investigate and present additional background and character evidence constitute ineffective assistance of counsel? Second, does the failure to investigate and present mental state evidence at the penalty phase constitute ineffective assistance of counsel?

The answer to the first question is no. Peters's investigation and presentation of background and character evidence did not "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

In federal court, Douglas uncovered additional information relating to his background and character that would have been relevant and admissible at the penalty phase.

However, the Court cannot say that the failure to uncover this information was constitutionally deficient. Information relating to Douglas's life was most accessible from Douglas himself. Douglas told Peters that he did not know who his mother was, that he lived for a while with an alcoholic who locked him in a closet, that he lived with the Douglases and took their last name, and that he ran away at 15 to join the Marines. (Resp. Peters Direct at 23.) Peters did not send anyone to Chicago to investigate Douglas's upbringing because Douglas told him that his parents were dead and his childhood was a "blank." (Pet. Peters Direct at 22-23.)

"[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Strickland, 466 U.S. at 691. In this case, Peters obtained some background information from Douglas and his family, but Douglas foreclosed other avenues of investigation by telling Peters that his parents were dead and that his past was a blank. He cannot now argue that, despite the information he provided, Peters should have conducted a more thorough investigation.

In addition, the court finds that there is no reasonable probability that, had the jury been provided with the additional background information presented at the evidentiary hearing, it "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 694.

The jury heard much of the information that was presented at the evidentiary hearing. The defense witnesses at the penalty phase testified that Douglas was an orphan who lived with several families growing up and ran away from home at 15 to join the Marines; that he was probably deprived of food as a child because he was obsessive about keeping adequate amounts of food available; that he was honorably discharged from the Marines as a sergeant; that he was a quiet and helpful neighbor; that he bought food for needy people; that he was

generous and non-violent; that he was a good father; that he was a hard worker who produced high-quality work; and that he became nauseated at the sight of blood.

Douglas's childhood poverty, status as an orphan who was shuttled from family to family, military service, work history, and character were presented to the jury. The evidence presented at the hearing in federal court, while presented in a more thorough and complete manner, was not significantly different or more compelling than the information presented at trial. The only evidence that was not at least implied at trial was the sexual assault Douglas suffered in a Florida jail, the medals and commendations he received in the military, and his efforts to save two sailors from drowning. However, the Court cannot say that the addition of these three pieces of information would have altered the jury's perception of Douglas such that it would not have voted for death. Therefore, the Court DENIES the claim that Peters was Ineffective for failing to present additional background and character evidence at the penalty phase.

As to the second question, whether the failure to investigate and present mental state evidence at the penalty phase was deficient, the answer is also no.

The Ninth Circuit has held that, "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." Caro v. Calderon, 165 F.3d 1223,1227 (9th Cir.), cert. denied, 119 S.Ct. 2414 (1999). The "failure to investigate [the defendant's] mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." Smith v. Stewart, 189 F.3d 1004, 1009 (9th Cir. 1999) (internal quotation omitted), cert. denied, __ S.Ct. __, 2000 WL 1056515 (Oct. 16, 2000). In preparing for a capital sentencing hearing, trial counsel has a duty to investigate the defendant's background and provide that information to mental health experts who are examining his or her client. See Wallace v. Stewart, 184 F.3d 1112, 1117 (9th Cir. 1999), cert. denied, 120 S.Ct. 844 (2000).

The question before the Court is whether Peters's investigation and presentation of mental state evidence at the penalty phase was reasonable. The focus of the inquiry is not on "what evidence his counsel could have obtained." Babbitt v. Calderon, 151 E.3d 1170, 1175 (9th Cir. 1998), cert. denied, 525 U.S. 1159 (2000). To determine whether counsel's conduct was reasonable, the Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

Peters clearly considered presenting mental state evidence at the penalty phase. He thought that there might be "some psychosexual problem with Mr. Douglas that might be of some use" at the penalty phase (2/18 EH 8), and he "saw things in the police reports . . . that led [him] to believe that this was a psychological crime." (2/18 EH 16.) Peters recognized that the guilt phase evidence against Douglas was strong and he "wanted to see if [he] could develop [mental state evidence] for a penalty phase." (2/18 EH 37.)

Peters had two mental health experts appointed to assess Douglas's mental state. As explained above, the experts were told to concentrate on Douglas's complaints of claustrophobia. However, Peters also talked to Dr. Rogers about "competency or any other mental conditions that might be useful either in defending Mr. Douglas or mitigating what could happen to him if he got convicted." (2/18 EH 8.)

Peters instructed Dr. Rogers and Dr. Sharma to "use whatever technical tools that a professional psychologist would use in getting information that I could use." (2/18 EH 12.) Peters also attempted to obtain information regarding Douglas's background to assist the mental health experts. To that end, he talked to Douglas himself about his background, he talked to Douglas's wife and son, and he obtained information from reviewing the file from Douglas's 1977 arrest. Peters provided Dr. Rogers with the information he obtained regarding Douglas's background, including that Douglas had been

orphaned and that he was kept as a child by an alcoholic who would lock him in a closet. (2/18 EH 10-12.)

Although Peters was taking steps to obtain mental state evidence for presentation at the penalty phase, he was severely hampered in his efforts by Douglas's refusal to cooperate. Douglas "wanted nothing to do with psychiatric defenses of any sort." (2/17 EH 182.) Peters had "a number of conversations" with Douglas to convince him to cooperate with Dr. Rogers, however, he was "emphatic that he would not deal with Dr. Rogers or anybody else of that nature anymore, that he wasn't good for the crime, there was nothing wrong with him." (2/18 EH 13, 37.)

Douglas also prevented Peters from discovering evidence that might have assisted the mental health experts. He foreclosed avenues of investigation into his background by telling Peters that his parents were dead and that his past was a "blank." (Pet. Peters Direct at 22-23.) "[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigative decisions." Strickland, 466 U.S. at 668. Douglas cannot now argue that, despite the information he provided, Peters should have conducted a more thorough investigation.

Peters attempted to investigate potentially mitigating mental state evidence. He retained two mental health experts, provided them with information regarding Douglas's background, and directed them to determine if Douglas had any mental impairments that could be used at the penalty phase. However, Douglas was not forthcoming regarding his social history, refused to cooperate with the mental health experts, and was adamant that he did not want mental state evidence presented at trial. In addition, Peters did not believe that Douglas's lack of cooperation was due to any mental disease or defect. (2/18 EH 58.) Under these circumstances, Peters did not provide deficient performance by acquiescing to Douglas's decision not to present mental state evidence at the penalty phase. See Gerlaugh v. Stewart, 129 F.3d 1027, 1034-35 (9th

Cir. 1997); Jeffries v. Blodgett, 5 F.3d 1180, 1198 (9th Cir. 1993); Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985).

Based on the foregoing, the Court DENIES Penalty Claim 1(d).

d. Claim 1(e) - Failure to Object

Douglas argues that Peters provided deficient performance by failing to object to the prosecutor's improper argument at the penalty phase. (Pet. at 108-09.)

According to Douglas, the prosecutor "urged the jury to consider several irrelevant circumstances as aggravating factors, and urged the jury to make an arithmetic determination based on those factors." (Pet. at 109.)

To obtain relief on this claim, Douglas must establish that Peters's failure to object to the prosecutor's allegedly improper statements, "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. From a strategic perspective, "many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation and hyper technicality." United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991).

The Court reviewed the instances of alleged prosecutorial misconduct in the state court record. In reviewing this claim, the Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In light of that presumption, the Court cannot say that the failure to object to the prosecutor's statements was unreasonable. This conclusion is supported by the holding in United States v. Necoechea, 986 F.2d 1273 (9th Cir. 1993). In that case, the Ninth Circuit rejected an ineffective assistance of counsel claim for failure to object to prosecutorial vouching, stating that "the

failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." Id at 1281 (quoting Strickland, 466 U.S. at 689). Claim 1(e) is DENIED.

e. Claim 1(f) - Failure to Adequately Contest the State's Evidence

Douglas claims Peters failed to use photographic evidence available from the 1977-78 trial to impeach the testimony of Vickie Pendleton and Julie McGettrick. Pendleton testified that Douglas forced her to orally copulate him and that he talked about making "snuff" films. McGettrick testified that she posed nude for Douglas because she was afraid of him and that he talked about making snuff movies. Douglas claims the photographic evidence would have tended to show that the sexual contact with both witnesses was consensual.

The record shows that certain photographs were introduced into evidence at trial. Some of the pictures were taken in 1976 and were pictures that Douglas took of Pendleton on the day she claimed he forced her to orally copulate him. (RT 3618-20.) The others were pictures of McGettrick that were taken on the day that she claimed Douglas talked to her about making snuff films. (RT 3641, 3650.) It is not clear if these are the pictures Douglas claims should have been introduced. Douglas fails to allege specifically what photographs should have been admitted, what the photographs showed, and what effect the introduction of the photographs would have had on the penalty phase. Therefore, he has failed to establish deficient performance or prejudice. Claim 1(f) is DENIED.

f. Claims 1(g) and (h) - Failure to Object

At the penalty phase, Mark Douglas testified regarding his good relationship with Douglas, Douglas's work

ethic, and his military career. On cross-examination, the prosecutor asked Mark if he knew that his father kept pornographic movies containing violence and books on sexual psychopaths. Douglas claims that Peters should have objected to these questions. (Pet. at 112-14.)

The record shows that Peters objected to two questions posed by the prosecutor regarding Mark's knowledge of Douglas's interest in pornography on the grounds of relevance. After a sidebar conference, the trial court stated that it was going to allow the line of questioning and told Peters that he could object when he thought it was appropriate. (PT 3781-83.)

Peters did not object to the prosecutor's next two questions regarding pornography. Mark testified that he was not aware that his father kept pornographic films or books. (RT 3783.) The jury had already heard substantial testimony concerning Douglas's dabbling in amateur pornography and the prosecutor did not focus on the questions or Mark's responses in his closing argument. The jury was also instructed that an attorney's question was not to be considered evidence. (PT 3471.) Based on the foregoing, the Court finds that Douglas suffered no prejudice from Peters's failure to object. Claims 1(g) and (h) are DENIED.

g. Claim 1(i) - Failure to Request Murder Instruction

Douglas argues that Peters "failed to request instructions on the definition of 'murder' at the penalty phase. Although the jury was charged with the task of determining whether a solicitation to commit murder had been established beyond a reasonable doubt based on the testimony of Pamela Sue Williams, the jury was not instructed on the definition of murder at the penalty phase." (Pet. at 115.)

On October 8, 1997, the Court denied Douglas's motion for summary adjudication of Penalty Claim 4 trial court

failed to instruct the jury on the definition of murder at the penalty phase). For the reasons stated in the court's order on Penalty Claim 4, this related ineffective assistance of counsel claim is DENIED.

Claim 2 - Improper Jury Selection Procedures

Douglas argues that the trial court "used improper procedures to select the jury by allowing potential jurors to formulate answers to critical disqualifying questions in advance." (Pet. at 115.)

a. Underlying Facts

In California, jurors must go through a death-qualification process. This process is a series of four questions designed to determine if a potential juror has very strong feelings about the death penalty.

In this case, the trial court told the prospective jurors that anyone who entertained any extreme opinions regarding the death penalty -- either for or against -- would not be permitted to serve as a juror. (RT 198-99.) The trial court also provided the jurors with written copies of the questions the night before they were asked to respond to the questions in court. (RT 269.)

b. Discussion

Douglas argues that the trial court's actions "gave prospective death-oriented jurors who wished to serve an opportunity to modify their answers to the death-qualifying questions." (Pet. at 116.) However, he has presented nothing to support the claim that any prospective juror changed his or her answers to the death-qualification questions. In the end, Douglas has presented no authority or persuasive argument that the trial court's actions were improper or that he was harmed thereby. Conclusory allegations which are not supported by a

statement of specific facts do not warrant habeas relief. See Boehme, 423 F.2d at 1058. Therefore, Claim 2 is DENIED.

Claim 5 - Erroneous Penalty Phase Instructions

Douglas claims the trial court erred in instructing the jury at the penalty phase. Specifically, he argues that the penalty phase instructions misled the jury by "(1) allowing the jury to consider irrelevant aggravating factors, (2) failing to instruct the jury that Petitioner's character could only be considered in mitigation, not aggravation, (3) allowing the jury to consider the same facts in support of multiple aggravating factors, (4) failing to instruct the jury that it could consider the disparate treatment of Hernandez in determination of the appropriate penalty, and (5) charging the jury that it 'shall' return a death verdict if aggravating circumstances outweigh mitigating circumstances." (Pet. at 120-21.)

A faulty jury instruction compels the issuance of a writ only where "the ailing instruction so infected the entire trial that the resulting conviction violates due process." McGuire, 502 U.S. at 72 (quoting Cupp, 414 U.S. at 147). It is not enough that the instruction is "undesirable, erroneous, or even universally condemned"; to warrant habeas relief the instruction must have violated some constitutional right. Donnelly, 416 U.S. at 643. Whether the instruction violated due process depends "upon the evidence in the case and the overall instructions given to the jury." Duckett, 67 F.3d at 745.

a. Failure to Delete Inapplicable Factors

Douglas contends that the trial court should have deleted inapplicable penalty factors from the instructions.

The jury was instructed that it was to consider the listed factors "if applicable." (RT 3951.) The words "if applicable" told the jury that not all of the factors would be relevant and that it should not consider the factors that did not

apply. The Ninth Circuit has rejected similar claims in Williams, 52 F.3d at 1481, and Bonin v. Calderon, 59 F.3d 815, 848 (9th Cir. 1995). This subclaim is DENIED.

b. Failure To Instruct That Character Evidence Could Only Be Considered in Mitigation

The jury was instructed that, pursuant to California Penal Code § 190.3(k), it could consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other factor proffered by the defendant as a factor in mitigation of the penalty, including his character." (RT 3952.) Douglas argues that the court should have instructed the jury that his character could only be used in mitigation and not in aggravation.

Douglas failed to request the modification of the standard factor (k) instruction he now contends should have been given. He also failed to object to the prosecutor's argument regarding the application of factor (k). In addition, the United States Supreme Court has held that the factor (k) instruction given at trial is constitutional. See Boyde v. California, 494 U.S. 370, 386 (1990). Therefore, this subclaim is DENIED.

c. Instructions Allowed the Jury to Consider the Same Facts in Support of Multiple Aggravating Factors

Douglas argues that the trial court tailed to instruct the jury that a single event may only support one aggravating factor. Pursuant to California Penal Code § 190.3(b), the jury may consider "the presence or absence of other criminal activity by the defendant which involves the use or attempted use of force or violence or the express or implied threat to use force or violence." (RT 3951.) Douglas argues that the instructions

allowed the prosecutor to argue that the jury should consider the 1977 solicitation to commit murder under multiple aggravating factors.

This subclaim is DENIED. The prosecutor argued that the jury should consider the 1977 solicitation under section 190.3(b). He did not ask the jury to consider that evidence under any other aggravating factor. The jury instructions were constitutional and there is no danger that the jury double-counted the 1977 solicitation.

d. Failing To Instruct on Disparate Treatment of Hernandez

Douglas requested that the trial court instruct the jury that it could consider the disparity of treatment between Hernandez and Douglas at the penalty phase as mitigation. (RT 3878.) The court denied the request.

Even assuming the trial court had a duty to instruct the jury as requested, the error was harmless. The jury was instructed that it could consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other factor proffered by the defendant as a factor in mitigation of the penalty." (RT 3952.) This would include the disparity in treatment of Hernandez. Peters told the jury during closing argument at the penalty phase that it should consider the fact that Hernandez was a participant in the homicidal acts and was not punished. (RT 3925, 3944, 3947.) Neither the judge nor the prosecutor told the jury that it could not consider that information. Therefore, the alleged error did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638.

e. Mandatory Weighing Instruction

Finally, Douglas argues that error occurred when the jury was instructed in the penalty phase that if the aggravating

factors outweighed the mitigating factors, it "shall" impose death. (RT 3962.)

The instruction at issue is constitutional. Boyde, 494 U.S. at 370. Therefore, this subclaim is DENIED.

Based on the foregoing, Claim 5 is DENIED.

Claim 6 - Improper Admission of "Other Crimes" Evidence

Douglas claims the testimony of Vickie Pendleton should not have been admitted as evidence of other violent crimes committed by him. Douglas argues that the prosecutor erred in offering testimony of other crimes which he conceded could not be proven beyond a reasonable doubt, that the trial court improperly admitted Pendleton's testimony, and that the instructions were improper. (Pet. at 123-24.)

This claim raises an issue of the application of state law. As discussed in more detail earlier, this Court cannot consider a claim of violation or erroneous application of state law. McGuire, 502 U.S. at 67. The Court may grant relief only if the admission of the allegedly improper evidence "so fatally infected the proceedings as to render them fundamentally unfair." Jammal, 926 F.2d at 919.

Even assuming the evidence was improperly admitted, the error did not render the trial fundamentally unfair. Before the jury could consider evidence of other crimes, it was instructed that the prior criminal act had to be proven beyond a reasonable doubt. (RT 3955.) In this case, the prosecutor conceded that he had not met his burden. (RT 3889.) Jurors are presumed to follow instructions. Span, 75 F.3d at 1390. Therefore, the Court assumes that the jurors would have accepted the prosecutor's concession and would not have considered Pendleton's testimony at the penalty phase. Claim 6 is DENIED.

Claim 7 - Erroneous Admission of Testimony of Julie McGettrick

Douglas contends that his constitutional rights were violated "because of the trial court's erroneous admission of the irrelevant and prejudicial testimony of Julie Ann McGettrick, and because of counsel's failure to object to its admission." (Pet. at 126.)

A federal court cannot consider a claim of violation or erroneous application of state law. McGuire, 502 U.S. at 67. However, a federal court may grant habeas relief on a state law claim in those rare instances where the violation of state law amounts to a due process violation. Harris, 465 U.S. at 41.

McGettrick testified that she posed nude for Douglas because she was afraid of him and that he talked about making snuff movies with her. (RT 3637-42.) Even assuming McGettrick's testimony was improperly admitted, the error was harmless. Her testimony was relatively innocuous compared to other aggravating evidence presented at the penalty phase. Neither attorney mentioned McGettrick's testimony during closing arguments. The judge did not instruct the jury that it was to consider any crime committed against McGettrick. Her testimony had little if any impact at the penalty phase as there was no basis for the jury to consider her testimony. Claim 7 is DENIED.

Claim 8 - Improper Admission of Evidence Relating to 1977 Arrest

Douglas claims the trial court erred when it allowed the prosecution to present evidence relating to the crimes committed by him in 1977 because he had entered a plea to the lesser offense of solicitation to commit an assault. (Pet. at 128.)

a. Underlying Facts

In 1977, Douglas was arrested and charged with attempted murder, solicitation to commit murder, and unlawful possession of a firearm. (1 Supp CT 7-8.) The information was later amended. Douglas's 1978 trial ended in a mistrial, the solicitation to commit murder charge was dismissed, and Douglas pled nolo contendere to the charge of solicitation to commit an assault. (2 Supp CT 762-63.) He received a suspended sentence, credit for 115 days served in custody, and three years probation. He successfully completed his probation and, in 1982, was permitted to withdraw his plea and enter a plea of not guilty. Pursuant to California Penal Code § 1203.4, the information was dismissed. (2 Supp CT 789-90.)

At Douglas's 1984 trial, the trial court ruled that the conviction for solicitation to commit an assault was inadmissible on the grounds that the reporter's notes from the 1978 trial had been destroyed. Therefore, the trial court could not adequately determine whether the plea had been voluntarily entered. (RT 3864-65.) However, the trial court allowed the prosecution to introduce the facts underlying the conviction as aggravating evidence.

b. Applicable Law

California Penal Code § 190.3(b) provides that the prosecution may present evidence of any prior criminal activity by a defendant which involved the use or attempted use of force or violence. The only limitation on the introduction of such evidence at the penalty phase is that any criminal activity "for which the defendant was prosecuted and acquitted" is inadmissible. Douglas, 50 Cal.3d at 528. In addition, the prosecution must prove the prior criminal activity beyond a reasonable doubt before it can be used as an aggravating factor in the penalty phase.

The prosecution may, during the penalty phase, introduce the facts underlying a petitioner's prior conviction by guilty plea as long as the evidence has "some minimal indicium

of reliability beyond mere allegation." McDowell v. Calderon, 107 F.3d 1351, 1365 (9th Cir. 1997), overruled on other grounds, 130 F.3d 833 (9th Cir. 1997) (en banc) (citation omitted).

c. Discussion

The evidence in this case was sufficiently reliable. Pamela Williams testified that Douglas offered to pay her $1,000 to assist him in making a snuff movie in which young women would be tortured and killed on camera. In a surreptitiously taped conversation, Douglas described in gruesome detail his plan to torture and murder his intended victims (who were undercover policewomen). (RT 3676-97.) Peters had the opportunity to cross-examine Williams to test the reliability of her testimony. The court instructed the jury that, before it could consider the evidence of the solicitation offense, it had to find beyond a reasonable doubt that Douglas committed that crime. (RT 3955.) Based on all the circumstances, the relitigation of the prior conviction did not render the sentencing phase unfair. Therefore, Claim 8 is DENIED.

Claim 9 - Improper Admission of Evidence Relating to 1977 Crimes

Douglas argues that the State should not have been allowed to use the evidence from the 1978 trial in the 1984 trial because it failed to preserve the reporter's transcript of the earlier proceeding. (Pet. 13 at 131.) Douglas argues that without the court reporter's notes he was unable use the cross-examination of the witnesses in the 1978 trial to impeach those witnesses in the 1984 trial.

It is undisputed that the State preserved the physical evidence from the 1978 trial but failed to preserve the court reporter's notes. (RT 3573.) The notes were destroyed on

January 6, 1984, after the arrest warrant was issued for the capital crimes but before Douglas was arrested.

The failure to preserve potentially exculpatory evidence violates due process only if the exculpatory value of the evidence was apparent before it was destroyed and the defendant is unable to obtain comparable evidence by other reasonably available means. California v. Trombetta, 467 U.S. 479, 489 (1984). The defendant must also show that the prosecution destroyed the evidence in bad faith. Villafuerte v. Stewart, 111 F.3d 616, 625 (9th Cir. 1997).

Douglas has failed to establish that he is entitled to relief on this claim. First, the exculpatory value of the evidence was not apparent before it was destroyed. The best that can be said is that the notes may have contained information that could have been used to impeach the penalty phase witnesses. Second, Douglas had access to the police reports, physical evidence, and the transcripts from the 1977-78 preliminary hearing during which the prosecution's witnesses were cross-examined. Therefore, his ability to cross-examine the witnesses in 1984 was not significantly affected. Finally, Douglas has failed to establish any bad faith on the part of the prosecution. The court reporter's notes were routinely destroyed under state law. See California Government Code § 69955(d). Claim 9 is DENIED.

Claim 10 - Prosecutorial Misconduct at the Penalty Phase

Douglas raises several claims of prosecutorial misconduct at the penalty phase. The individual subclaims are addressed below.

On federal habeas review, the Court does not ask whether the "prosecutor's remarks were undesirable or even universally condemned." Darden, 477 U.S. at 181. "'The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting

conviction a denial of due process."' Williams, 139 F.3d at 744 (quoting Darden, 477 U.S. at 181).

a. Claim 10(a) - Prosecutor Urged Jury to Consider Irrelevant Factors as Aggravation and to Make a Mathematical Determination of the Penalty

Pursuant to California Penal Code § 190.3, a penalty jury is to consider the following factors in determining whether to impose the death penalty:

> (a) the circumstances of the crime of which the defendant was convicted;
> (b) the presence or absence of violent criminal activity by the defendant;
> (c) the presence or absence of any prior felony conviction;
> (d) whether the offense was committed while the defendant was under the influence of extreme emotional or mental disturbance;
> (e) whether the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
> (f) whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;
> (g) whether the defendant acted under duress or domination of another person;
> (h) whether the defendant was able to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law as a result of mental disease or defect, or the effects of intoxication;
> (i) the age of the defendant at the time of the crime;
> (j) whether the defendant's participation in the

commission of the offense was minor; and
(k) any other circumstance which extenuates the gravity of the crime.

California Penal Code § 190.3

Under California law, the factors relating to mitigating circumstances ((d),(e),(f),(g),(h),(j), and (k)) can only be considered in mitigation. People v. Davenport, 41 Cal.3d 247, 289-90, 221 Cal.Rptr. 794 (1985); People v. Boyd, 38 Cal.3d 762, 777, 215 Cal.Rptr. 1 (1985); People v. Proctor, 4 Cal.4th 499, 557, 15 Cal.Rptr.2d 340 (1993). The lack of evidence on one of these factors cannot be used as a factor in aggravation. Davenport, 41 Cal.3d at 288-90.

During penalty phase closing argument, the prosecutor used a chart on a blackboard to measure aggravating and mitigating evidence. During his discussion of factor (d), the prosecutor argued that Douglas did not present any evidence that the crimes were committed when he was under the influence of an extreme mental or emotional disturbance and that the lack of evidence "gets a check mark on the aggravation side." (RT 3905.)

The prosecutor's argument was improper under state law. However, the Court finds that it did not render the trial fundamentally unfair. The jurors were instructed that they were to consider the penalty factors "if applicable." (PT 3951.) Jurors are presumed to follow instructions, Span, 75 F.3d at 1390, whereas "arguments of counsel generally carry less weight with a jury than do instructions from the court." Boyde, 494 U.S. at 384. In addition, the prosecutor told the jury to weigh -- not count and compare -- the aggravating and mitigating circumstances to determine the appropriate penalty. (RT 3886.) Finally, Peters properly informed the jury that "the instruction also says you can consider these factors, and it has a small phrase, prepositional phrase, 'if applicable.' [¶] What it means is if you find one of these categories doesn't fit into these

factors you are not to regard it. It doesn't mean it is an aggravating factor." (RT 3928.) Therefore, the jury was properly instructed and Peters's argument effectively countered the prosecutor's argument. This subclaim is DENIED.

b. Claim 10 b - Prosecutor Argued Age as Aggravating

Douglas contends that the prosecutor improperly urged the jury to consider his age as a factor in aggravation. (See RT 3910.)

In Tuilaepa v. California, 512 U.S. 967, 977 (1994), the United States Supreme Court held that, "[b]oth the prosecution and the defense may present valid arguments as to the significance of the defendant's age in a particular case." Claim 10(b) is DENIED.

c. Claim 10(c) - Prosecutor Improperly Argued that 1977 Crimes Could be Considered in Aggravation

Douglas argues that the prosecutor committed misconduct by urging the jury to consider the evidence of the 1977 crimes under multiple aggravating factors. (Pet. at 137-38.)

According to Douglas, the 1977 crimes could only be used under factor (b) -- presence of prior criminal conduct. However, Douglas contends that the prosecutor also argued that evidence of prior crimes was relevant under factor (a) -- circumstances of the capital crime. For instance, the prosecutor referred to the 1977 crime to support the argument that there was no evidence to support factor (d) -- whether the capital offense was committed while the defendant was under the influence of an extreme emotional or mental disturbance. In connection with factor (d), the prosecutor argued:

> [A]s you look in the evidence in this case, if anybody has any doubts about this, if anybody thinks, for example, that the defendant was acting under some kind of terrible emotional disturbance, he was maybe distraught for one reason or another, listen to the tape of the -- of that meeting that he had with Pamela Williams. . . No mental distress or anything like that. He's just -- he's obviously just coming up with this plan to somehow please himself. So that gets a check mark on the aggravation side.

(RT 3904-05.)

The prosecutor made similar arguments relating to factors (h) and (j). (RT 3909-11.)

As discussed above, it was improper for the prosecutor to argue that the absence of evidence on a mitigating factor constituted evidence in aggravation. It was also improper for the prosecutor to argue that evidence of the 1977 crimes could be used in support of aggravating factors (other than factor (b)). Douglas, 50 Cal.3d at 537. Nevertheless, the Court finds that the improper argument did not render the trial fundamentally unfair. As stated above, the jury was instructed not to consider inapplicable factors and this instruction was repeated by defense counsel. Claim 10(c) is DENIED.

d. Claim 10(d) - Prosecutor Improperly Mentioned Where Douglas was Arrested

Douglas argues that the prosecutor improperly referred to the fact that he was arrested in Las Vegas during closing argument. The fact that Douglas was arrested in Las Vegas was not introduced as evidence at trial, therefore, the prosecutor erred in informing the jury of that fact. However, based on all the circumstances, the Court finds that the information regarding where Douglas was arrested did not result

in an unfair trial. Subclaim 10(d)is DENIED.

e. Claims 10(e) and (f) - Prosecutor Improperly Referred to Douglas's Interest in Pornography

Douglas argues that the prosecutor improperly referred to his interest in pornography and sexual psychopathology during the cross-examination of his son. (Pet. at 140, 142.)

Even assuming the prosecutor committed misconduct, any error was harmless. Evidence had already been introduced that Douglas had a collection of photographs depicting nude women in bondage situations. The questions themselves were not graphic or lurid. The prosecutor did not revisit the issue during closing argument and the jury was instructed that an attorney's question was not evidence. Further, Mark answered that he had never seen anything like what the prosecutor described at his father's shop. Therefore, this subclaim is DENIED.

f. Claim 10 - Improper Victim Impact Argument

During closing argument, the prosecutor referred to the impact of the crime on the victims and their families. (PT 3919-20.)

In Booth v. Marilyn, 482 U.S. 496 (1987), the United States Supreme Court held that the effect of a homicide on the victim's friends and family was irrelevant to the capital sentencing determination. However, in Payne v. Tennessee, 501 U.S. 808, 827 (1991), the Supreme Court overruled Booth and held that a State may choose to allow consideration of victim impact evidence during the penalty phase of a capital trial. However, in certain circumstances, the victim impact evidence could lead to a denial of due process if the admission of the evidence rendered the proceedings fundamentally unfair.

Id. at 831 (O'Connor, J., concurring)

In this case, the prosecutor's argument was not overly inflammatory and he did not dwell on the effects of the murders on the victims or their families. He merely expressed what the jury knew as a matter of common sense that the murder of two young women would have an impact on their families. The prosecutor's argument did not render the penalty phase fundamentally unfair, therefore, this subclaim is DENIED.

Claim 11 - Jury Was Not Instructed That They Had to Find Beyond a Reasonable Doubt That Douglas Committed Other Uncharged Crimes

Douglas argues that his constitutional rights were violated "because the jury instructions failed to require that the jury unanimously find beyond a reasonable doubt that Petitioner had committed other uncharged crimes." (Pet. at 144.)

Douglas fails to provide any specific factual or legal argument in either the petition or the final briefing to support this claim beyond bare allegations of unconstitutionality. Without presenting additional facts or law, Douglas has failed to establish that he is entitled to relief on this claim. Conclusory allegations that are not supported by a statement of specific facts do not warrant habeas relief. See Boehme, 423 F.2d at 1058. In addition, the introduction of evidence underlying prior unadjudicated criminal conduct does not violate the constitution. See McDowell,107 F.3d at 1365.

Claim 12 - Trial Court Considered Irrelevant Information in Considering the Motion for Modification of Sentence

Douglas argues that the trial court's consideration of the automatic motion to modify the death sentence was improper because it "failed to comply with state procedure requiring that the court confine its inquiry to evidence presented

at trial." (Pet. at 146.)

Under California Penal Code § 190.4(e), when a jury returns a verdict of death, the defendant is deemed to have made an application for modification of the death sentence. The trial judge is required to independently review the evidence, take into account the aggravating and mitigating circumstances, and determine whether the finding by the jury that the aggravating evidence outweighed the mitigating evidence was contrary to law or the evidence presented. The judge is to state on the record the reasons for his findings.

Douglas argues that the trial judge improperly considered a probation report which contained information outside the evidence presented at trial, including statements from the victims' families and from police officers. Under § 190.4(e), the trial court is limited to reviewing the evidence that was presented to the jury. People v. Lang, 49 Cal.3d 991, 2044, 264 Cal.Rptr. 386 (1989).

This is a question of the application of state evidentiary law. Therefore, the Court must determine whether the trial court's consideration of the probation report rendered the trial fundamentally unfair. See Jammal, 926 F.2d at 919.

The Court cannot say that the trial court's consideration of the information contained in the probation report rendered the trial fundamentally unfair. The statements by Jones's mother were nothing more than a mother expressing grief over the loss of her daughter. The admission of such evidence at the sentencing is not unconstitutional. See Payne, 501 U.S. at 827. The statements by Detective Johnson that he believed that Douglas had committed other murders were irrelevant and improper. Nevertheless, the Court finds it unlikely that the trial court relied on the unsupported speculation of a police detective that Douglas committed other murders as a basis to deny the motion for modification. The remaining information contained in the report was presented at trial. Claim 12 is DENIED.

Claim 13 - Incompetence

Douglas claims that he suffered from neurological, psychiatric, psychological, and developmental deficiencies which severely impaired his thought processes and rendered him incompetent to stand trial. (Pet. at 147.)

a. Applicable Law

The Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. Medina v. California, 505 U.S. 437, 439 (1992). The prohibition against trying an incompetent defendant "is fundamental to an adversary system of justice." Drope v. Missouri, 420 U.S. 162, 172 (1975). The test for competency to stand trial is whether the defendant had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he [had] a rational as well as factual understanding of the proceedings against him." Boag v. Raines, 769 F.2d 1341, 1343 (1985) (quoting Dusky v. United States, 362 U.S. 402 (1960) (per curiam)

Douglas appears to be pursuing only a substantive incompetency claim. A procedural claim asserts that the trial court failed to conduct a competency hearing on its own initiative in violation of Pate v. Robinson, 383 U.S. 375 (1966), because, at the time of trial, there was sufficient evidence of incompetence to warrant a hearing. A substantive incompetency claim asserts that the petitioner's due process rights were violated because he was tried while incompetent, regardless of whether the court should have conducted a Pate hearing. To obtain relief on a substantive incompetence claim, Douglas must present evidence "sufficient to positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to the mental capacity of the petitioner." Watts v. Singletary, 87 F.3d 1282,1290 (11th Cir. 1996)

(internal quotation omitted). "In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt as to his competency, even if those facts were not presented to the trial court." Boag, 769 F.2d at 1343. Although retrospective determinations of competency are not prohibited, they are disfavored and the Court gives considerable weight to the lack of contemporaneous evidence of incompetence. See Odle v. Calderon, 919 F.Supp. 1367, 1378 (N.D. Cal. 1992).

Douglas has not set forth facts "sufficient to positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to [his] mental capacity." Watts, 87 F.3d at 1290. Peters testified that he spent a considerable amount of time with Douglas in preparation for trial and that, "I had no doubt then, I have no doubt now, looking back at my contact with him that he was competent. There wasn't any question ever in my mind about that aspect." (2/18 EH 16-17.) Dr. Rogers testified that she saw no evidence of a major mental disorder and that she told Peters that Douglas was competent. (2/19 EH 141.) In addition, neither the prosecutor nor the trial judge expressed any concern on the record concerning Douglas's competency. The Court deems significant "the fact that the trial judge, government counsel, and [petitioner's] own attorney did not perceive a reasonable cause to believe [he] was incompetent." Hernandez v. Ylst, 930 F.3d 714, 718 (9th Cir. 1991). Finally, the transcript of Douglas's motion to substitute counsel (3(b) Supp CT 494-533), is strong evidence that he had "a rational as well as factual understanding of the proceedings against him." Boag, 769 F.2d at 1343. Although Douglas presented the testimony of Dr. Rosenberg in support of his argument that he was not competent (see 2/18 EH 178), the Court gives more weight to the contemporaneous evidence of competence. Claim 13 is DENIED.

Claims 14 and 15 - Conflict of Interest with Appellate Counsel

Douglas claims his contentious relationship with his appellate attorney, which ultimately led to Douglas filing a lawsuit against the attorney, created an actual conflict of interest. He also argues that his constitutional rights were violated because the state court denied appellate counsel's motion to be relieved. (Pet. at 151-53.)

a. Underlying Facts

Douglas filed a lawsuit against his appellate attorney alleging malpractice in August 1990. See Douglas v. Schwartz, San Francisco Superior Court, Civil No. 921547 (1990). The lawsuit was based on the attorney's alleged failure to communicate with Douglas and his failure to adequately prepare and file a state habeas petition. In August 1990, appellate counsel moved to withdraw. The California Supreme Court denied the motion. The lawsuit for malpractice was dismissed with prejudice on October 18, 1990, after a demurrer was sustained on September 18, 1990.

b. Applicable Law

To establish a Sixth Amendment violation based on a conflict of interest, petitioner must show: (1) that his attorney actively represented competing interests, and (2) that an actual conflict of interest adversely affected the attorney's performance. Cuyler, 446 U.S. at 348. The mere possibility of a conflict is insufficient to obtain relief on a conflict of interest claim. Morris, 945 F.2d at 1456.

c. Discussion

Douglas claims the lawsuit pitting him against his

appellate attorney suggests divided loyalties and a conflict of interest. He cites an Eighth Circuit case for that proposition. Smith v. Lockhart, 923 F.2d 1314, 1321 (8th Cir. 1991). However, the court in Smith recognized "the danger of any holding implying that defendants can manufacture conflicts of interest by initiating lawsuits against their attorneys. . . . A patently frivolous lawsuit brought by a defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel." Id. at 1321, fn. 11.

Douglas has not alleged facts sufficient to show that an actual conflict of interest existed. The mere filing of a lawsuit is not enough to constitute an actual conflict of interest. Douglas has failed to show how the lawsuit caused divided loyalties or impacted his appellate attorney's representation. He has also failed to allege facts supporting any other conflict of interest. The mere failure to file a state habeas petition is not sufficient to obtain relief because Douglas's federal attorneys filed a state habeas petition on his behalf. Therefore, Claim 15 is DENIED.

Claim 16 - California's Death Penalty Statute is Unconstitutional

Douglas argues that California's capital punishment system under which he was sentenced was unconstitutional. Specifically, he argues that the statutory scheme (1) does not provide for intercase proportionality review, (2) does not adequately narrow the class of death-eligible defendants, (3) the unitary list of sentencing factors is unconstitutional, (4) gives the prosecution too much discretion to choose the individuals against whom the death penalty will be sought, and (5) violates equal protection. (Pet. at 155-56.)

a. Proportionality Review

The Constitution does not require comparative

proportionality review. Harris, 465 U.S. at 51.

b. Inadequate Narrowing

Douglas claims the California death penalty statute does not "genuinely narrow the class of person eligible for the death penalty." Douglas was sentenced to death under California's 1978 death penalty statute. In Harris, the United States Supreme Court held that California's 1977 death penalty statute was Constitutional. 465 U.S. at 54. The Supreme Court held that, "[b]y requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases." Id. at 53. However, there is a significant distinction between the 1977 and the 1978 laws. There were only seven special circumstances in the 1977 law. The 1978 law contains 32 categories.

Although this appears to be an unsettled question in federal court, Douglas fails to provide any specific argument or analysis in support of this claim beyond bare allegations of unconstitutionality. The United States Supreme Court and the Ninth Circuit have consistently upheld both the 1977 and 1978 versions of the California death penalty statute and, without presenting additional facts or law, Douglas has failed to establish that he is entitled to relief on this claim. Moreover, the special circumstance found in this case was one of the original seven contained in the 1977 law, therefore, it is unlikely that Douglas could show that his constitutional rights were violated in this case.

c. Unitary List of Sentencing Factors

The statute's unitary list of sentencing factors and its failure to label those factors as aggravating and mitigating is constitutional. Williams, 52 F.3d at 1484.

d. Prosecutorial Discretion

The fact that the statute vests discretion in the prosecutor to decide when to seek the death penalty does not render it unconstitutional. See Campbell v. Kincheloe, 829 F.2d 1453, 1465 (9th Cir. 1987).

e. Equal Protection

Douglas argues that the statute is unconstitutional because it is administered in a manner which violates equal protection. However, his argument is not factually or legally developed. He does not discuss the nature of the classifying trait, the standard of review to be used, the objective of the law, and whether the classification involves fundamental rights. These are all issues that must be addressed in an Equal Protection claim. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985); Heller v. Doe, 509 U.S. 312, 319-21 (1993). The Court will not grant relief on claims that are "conclusory and wholly devoid of specifics." Boehme, 423 F.2d at 1058.

Based on the foregoing, Claim 16 is DENIED.

Claim 17 - Jury Misconduct

Douglas alleges two instances of alleged juror misconduct which he claims allowed their deliberations to be influenced by extraneous information. (Pet. at 157.)

The Court granted an evidentiary hearing on this claim. At the hearing, Douglas presented no evidence to support this claim and presented no argument on this claim in the post-hearing briefs. Therefore, Claim 17 is DENIED.

Claim 19 - Unconstitutional Death Penalty Scheme

Douglas argues that California's "lethal gas method of execution constitutes cruel and unusual punishment." (Pet. at 159.)

In 1992, California death row inmate David Fierro and others filed a class action lawsuit challenging lethal gas as a method of execution. See Fierro v. Gomez, 77 F.3d 301, 302-03 (9th Cir. 1996). The Ninth Circuit held that lethal gas, as employed in California, constituted a cruel and unusual method of execution and enjoined its use. Fierro, 77 F.3d at 301. After the Fierro decision, the California statute governing executions was amended to provide lethal injection as the primary method of execution. Death row inmates sentenced before the effective date of the act were given the option of choosing lethal gas as the method of execution. See California Penal Code § 3604 (b).

Under state law, Douglas will be executed by lethal injection unless he affirmatively chooses to be executed by lethal gas. Douglas has not chosen lethal gas as his method of execution, therefore, this claim is not ripe and cannot be considered. See LaGrand v. Stewart, 133 F.3d 1253, 1264 (9th Cir. 1998); Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997).

In his final brief, Douglas also claims that his "execution, following over twelve years on death row, constitutes cruel and unusual punishment." (Petitioner's Brief re Claims Not Presented at Evidentiary Hearing and Not Related to Ineffective Assistance of Counsel at 143.) Douglas did not raise this claim in the federal petition, therefore, the Court will not consider it on the merits. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (holding claim raised for the first time in traverse not cognizable).

Based on the foregoing, this claim is DENIED.

Guilt Claim 28/Penalty Claim 19 - Cumulative Error

The Court finds that, with the exception of the

ineffective assistance of counsel claim discussed above, the claims raised in the petition, viewed either individually or cumulatively, do not warrant relief.

D. Claims Relating to Appellate Review in State Court

Claim 1 - Denial of Right to Meaningful Appellate Review

Douglas argues that the California Supreme Court "relied on a number of inaccurate references to the appellate record to deny [his] claims of error and to minimize the impact of the errors it acknowledged." (Pet. at 161.)

a. California Supreme Court Mistakenly Assumed that the Penalty Phase Instructions Required a Determination that Aggravating Circumstances Outweigh Mitigating Circumstances

In addressing Douglas's claim of penalty phase instructional error on direct appeal, the California Supreme Court stated "the jury was told that aggravating factors were strictly limited by statute and must be proved beyond a reasonable doubt." Douglas 50 Cal.3d at 533. Douglas argues that this statement was incorrect and denied him the right to a meaningful appeal.

The California Supreme Court's statement regarding the jury instructions was erroneous. The jury was instructed that "neither aggravating nor mitigating circumstances must be proven beyond a reasonable doubt." (RT 3960.) However, the state court's discussion of the jury instructions regarding aggravating factors was contained in a discussion of Douglas's claim that the mandatory language of the penalty phase instructions was unconstitutional. As stated in the analysis of

Penalty Claim 5(e) above, the "shall impose" instruction was constitutional, therefore, the California Supreme Court's mistaken assumption is irrelevant. This subclaim is DENIED.

b. California Supreme Court Adopted a New Argument by State on Appeal and Resolved a New Issue Concerning the Admissibility of Phillips's Testimony

At trial, Douglas claims that the prosecutor argued that Kathy Phillips's testimony was admissible because it was relevant to show a plan. On appeal, the California Supreme Court found that evidence, was admissible to show identity. Douglas, 50 Cal.3d at 510. Douglas argues that the fact that the California Supreme Court affirmed his conviction based on an argument not raised by the State at trial or in their appellate brief is unconstitutional.

Whether the California Supreme Court properly ruled that Phillips's testimony was properly admitted under state law is not cognizable on federal habeas review. See McGuire, 502 U.S. at 67. In addition, as discussed in relation to Claims 19 and 20, the Court found that the admission of Phillips's testimony did not render the trial fundamentally unfair. Therefore, this subclaim is DENIED.

c. Denial of Right to Meaningful Appellate Review

In this subclaim, Douglas argues that the California Supreme Court either misstated or exaggerated the information in the state court record in its opinion on direct appeal. However, Douglas fails to take the next step and allege how those alleged mistakes or mischaracterizations entitle him to federal habeas relief. The Court will not grant relief on claims, like this one, that are "conclusory and wholly devoid of specifics." Boehme,423 F.2d at 1058.

IV. ORDER

The Court has considered the testimony and exhibits introduced at the evidentiary hearing, the state court record, the arguments of counsel, and all of the papers, pleadings, and records on file herein. The Cour finds that Douglas has failed to establish that any claim warrants the granting of a writ of habeas corpus. Accordingly, the Court **DENIES** the Amended Petition for Writ of Habeas Corpus.

IT IS SO ORDERED.

Dated: November 9, 2000.

Ronald S.W. Lew
United States District Judge

(3)

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1424

In The

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

v.

FRED BERRE DOUGLAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK E. OVERLAND
Counsel of Record
MARK A. BORENSTEIN
JULIE M. RUHLIN
OVERLAND & BORENSTEIN LLP
6060 Center Drive, Seventh Floor
Los Angeles, California 90045
Telephone: (310) 215-6580
Facsimile: (310) 215-6581

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
REASONS FOR DENYING THE WRIT	1
ARGUMENT	3
I. PETITIONER MISUNDERSTANDS THE *STRICKLAND* PREJUDICE STANDARD	3
II. THE NINTH CIRCUIT APPLIED ESTABLISHED *STRICKLAND* PRINCIPLES TO FIND THAT RESPONDENT'S TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE REPRESENTATION IN THE PENALTY PHASE OF TRIAL	5
CONCLUSION	15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994).....14

Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995).....10

Babbitt v. Calderon, 151 F.3d 1170 (9th Cir. 1998).....4, 5

Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001).....10, 11

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), *cert. denied*, 504 U.S. 946 (1992).....14

Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002).....13

Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001).....8, 10

Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000).....10

Douglas v. Woodford, 316 F.3d 209 (9th Cir. 2003)..*passim*

Eddings v. Oklahoma, 455 U.S. 104 (1982)..... 6

Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996)..... 9

Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994)..... 8

Hitchcock v. Dugger, 481 U.S. 393 (1987)..... 7

Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).....10

Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995).....10, 13

Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001)..... 8

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002).....15

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).....13

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000).....13

Lockett v. Ohio, 438 U.S. 586 (1978)..... 6

Marshal v. Hendricks, 307 F.3d 36 (3d Cir. 2002)..... 4

TABLE OF AUTHORITIES – Continued

Page

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) 8

Mills v. Maryland, 486 U.S. 367 (1988) 7

Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001) 4

Neal v. Puckett, 296 F.3d 230 (5th Cir. 2002) 8

Penry v. Johnson, 532 U.S. 782 (2001) 7

Penry v. Lynaugh, 492 U.S. 302 (1989) 6

Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994) 8

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) 4, 5

Skipper v. South Carolina, 476 U.S. 1 (1986) 7

Stouffer v. Reynolds, 168 F.3d 1155 (10th Cir. 1999) 8

Strickland v. Washington, 466 U.S. 668 (1984) .....*passim*

Sumner v. Shuman, 483 U.S. 66 (1987) 7

United States v. Gray, 878 F.2d 702 (3d Cir. 1989) 14

Williams v. Taylor, 163 F.2d 860 (4th Cir. 1998).....2, 4

Williams v. Taylor, 526 U.S. 1048 (1999) 3

Williams v. Taylor, 529 U.S. 362 (2000).....1, 2, 5, 7, 8

STATE CASES

Commonwealth v. Smith, 675 A.2d 1221 (Pa. 1996).....9, 14

Goad v. Tennessee, 938 S.W.2d 363 (Tenn. 1996) 9

Hodge v. Kentucky, 68 S.W.3d 338 (Ky. 2002)..... 9

People v. Belmontes, 45 Cal. 3d 744, 248 Cal. Rptr. 126 (1988)..... 4

People v. Morgan, 719 N.E.2d 681 (Ill. 1999).....9, 14

TABLE OF AUTHORITIES – Continued

Page

People v. Mozingo, 34 Cal. 3d 926, 196 Cal. Rptr. 212 (1983) 15

Rose v. Florida, 675 So. 2d 567 (Fla. 1996) 9

State ex rel. Busby v. Butler, 538 So. 2d 164 (La. 1988) 9

State v. Wright, 653 A.2d 288 (Del.1994) 10

Turpin v. Christenson, 497 S.E.2d 216 (Ga. 1998) 9

STATE STATUTES

Cal. Penal Code §190.3 ..... 2, 4

STATEMENT OF FACTS

Respondent adopts the statement of facts in the reported opinion of the Court of Appeals, *Douglas v. Woodford*, 316 F.3d 209 (9th Cir. 2003),[1] reported in the Appendix to the Petition herein, at 1-25.

REASONS FOR DENYING THE WRIT

Respondent's Petition for Writ of Habeas Corpus was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, pre-AEDPA standards apply.

This case does not meet this Court's criteria for granting *certiorari* under Rule 10(a) of the Rules of the Supreme Court of the United States. On both "Questions" presented by Petitioner, the Ninth Circuit's decision is not in conflict with a decision of another circuit court, nor does the decision depart, in any way, let alone "so far from the accepted and usual course of judicial proceedings," to require this Court's intervention. Rather, the Court of Appeals applied settled law under *Strickland v. Washington*, 466 U.S. 668 (1984), and more recently in *Williams v. Taylor*, 529 U.S. 362 (2000), in a straightfoward manner, fully consistent with decisions in other circuit courts and the state courts.

---

[1] Petitioner erroneously claims that Hernandez was "retarded." No evidence of Hernandez' mental retardation is in the record. *See* Petition for Writ of Certiorari at 3 n.1.

Petitioner's perplexing argument is that the Court of Appeals misconstrued *Strickland*, *Williams* and their progeny, in holding the reasonable probability that a single juror would have voted against the death penalty, absent trial counsel's ineffective assistance, is insufficient to establish prejudice. Petition at 9. Yet, as Petitioner acknowledges, *see* Petition at 14, that is the *exact standard* for determining prejudice, i.e., whether "the result of the proceeding would have been different," *Strickland* at 694, which has been repeatedly applied by this Court and the circuit courts. In California, if a single juror declined to vote for imposition of the death penalty, the "result" of the penalty phase would have been different, since the death penalty could not be imposed without a unanimous jury verdict. *See* Cal. Penal Code §190.3. Instead, consistent with the judgment of the Court of Appeals, the trial court would have entered a sentence of life without the possibility of parole, unless the prosecutor elected to retry the penalty phase. Nothing in this Court's jurisprudence suggests that when both the *Strickland* and *Williams* decisions required a "different result" to establish prejudice, the Court really meant a "different verdict."

In California, converting the "different result" prejudice standard to proof of a "different verdict" as requested by Petitioner, would have a constitutionally impermissible consequence: a death verdict would stand even when mitigation evidence, that should have been presented by effective counsel would have prevented a unanimous death decision. There is simply no divergence of opinion on the settled principle that prejudice is established if the "result" of the penalty phase would have been different. In fact, the one decision cited by Petitioner as evidence of a split, *Williams v. Taylor*, 163 F.2d 860 (4th Cir. 1998), *see*

Petition at 14-15, was reversed by this Court. *See Williams v. Taylor*, 526 U.S. 1048 (1999). That is no reason for this Court to intervene.

There is also no split in the decisions of the circuit courts and no compelling reason for the Court to review Petitioner's second "Question." Both *Strickland* and *Williams* compel a thorough and complete penalty phase investigation. Though the nature and extent of a complete investigation may vary depending on the circumstances of each case, the constitutional principle applied below and in numerous cases remains the same: competent counsel must make a reasonable penalty phase investigation, sufficient to make a strategic decision whether and to what extent the discovered evidence should be presented to the penalty phase jury. Here, the Court of Appeals applied this settled principle to the facts and found that counsel failed to investigate adequately penalty phase evidence, not on the basis of material discovered by habeas counsel, but on the basis of readily available evidence that could have been discovered by trial counsel, without any assistance from Respondent. As with the first "Question" presented by Petitioner, there is no split in the circuits or any other compelling reason to review the Court of Appeals' judgment.

ARGUMENT

I. PETITIONER MISUNDERSTANDS THE *STRICKLAND* PREJUDICE STANDARD.

Petitioner inexplicably claims that prejudice is not established in the penalty phase of a capital trial by proof that a single juror may have declined to vote for death had

trial counsel performed effectively. Petition, 10-11. However, California law clearly prohibits the imposition of a death sentence absent a unanimous jury verdict of death. *People v. Belmontes*, 45 Cal. 3d 744, 815, 248 Cal. Rptr. 126 (1988). Accordingly, the failure of a single juror to acquiesce in a death verdict provides a different "result" within the meaning of *Strickland*. *See Marshal v. Hendricks*, 307 F.3d 36, 103-104 (3d Cir. 2002) (given the unanimity requirement for a death verdict, "the 'reasonable probability of a different outcome' would mean that only one juror need weigh the factors differently."), and *Neal v. Puckett*, 239 F.3d 683, 691-92 (5th Cir. 2001). Since there are only two possible sentences following conviction for capital murder – death or life without parole, *see* Cal. Penal Code §190.3, the Ninth Circuit's decision granting a new penalty phase trial or permitting the state to impose the lower penalty, *see Douglas v. Woodford*, App. at 25, is precisely the outcome California law would have required if at the original trial, one juror dissented from the imposition of the death penalty.

The sole decision relied on by Petitioner that Petitioner claims creates a conflict among the circuit courts is the Fourth Circuit's decision in *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998). *See* Petition at 14-15. That decision, however, was *reversed* by this Court on the ground that the Court of Appeal applied the wrong prejudice standard when that court reversed the district court's finding of prejudice in the penalty phase of trial.

Nor is there any conflict within the Ninth Circuit. *See* Petition at 16. In both *Silva v. Woodford*, 279 F.3d 825, 849 (9th Cir. 2002), and *Babbitt v. Calderon*, 151 F.3d 1170, 1176 (9th Cir. 1998), the Ninth Circuit did not require a different *verdict*, but rather indicated that the trial court

result – that is, a death sentence, would either have (a) remained the same because there would not have been a dissenting juror after consideration of the mitigation evidence that should have been uncovered, as in *Babbitt*, or (b) changed because one or more jurors would have declined to impose a death sentence after hearing the new mitigation evidence, as in *Silva*. The panel which decided the decision below obviously perceived no conflict. The decision below cited *both Babbitt*, *see* App. at 13, and *Silva*, *see* App. at 9, 13, 15 and 16.

II. THE NINTH CIRCUIT APPLIED ESTABLISHED *STRICKLAND* PRINCIPLES TO FIND THAT RESPONDENT'S TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE REPRESENTATION IN THE PENALTY PHASE OF TRIAL.

The decision of the Court of Appeals applied longstanding principles, as announced in *Strickland*, and recently applied in *Williams v. Taylor*, 529 U.S. 362, to find that trial counsel's failure to uncover mitigating evidence readily available at the time of trial without the help of Respondent, fell below the standard for effective penalty phase representation.[2] This Court's longstanding interpretation of Eighth Amendment jurisprudence has required that the sentencer be given the opportunity to

[2] The Court of Appeals did not, as Petitioner seems to claim, rely on any evidence that was not available at the time of trial, had trial counsel conducted an adequate penalty investigation. Moreover, the Ninth Circuit considered only evidence that could have been discovered *without* Respondent's cooperation. *See Douglas v. Woodford*, at App. 8 n.2 and 12-14.

assess "the character and record of the individual offender," as well as "the circumstances of the particular offense." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (internal quotation marks and citation omitted). As this Court has explained,

> [i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted).

The sentencer's constitutional mandate is therefore to render "a reasoned moral response" to the unique individual circumstances of the capital defendant. *Penry v. Lynaugh*, 492 U.S. at 327; *see also Eddings v. Oklahoma*, 455 U.S. at 111 (consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death"). Indeed, this Court has repeatedly struck down obstacles to full consideration of mitigating evidence by the capital sentencer. *See, e.g., Eddings*, 455 U.S. at 113-15 (invalidating sentence where state decision allowed as mitigation only evidence that would tend to excuse criminal liability); *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) (invalidating Ohio law that did not permit consideration of defendant's character, age, prior record, lack of specific intent to cause death, and role in the crime); *Penry v. Lynaugh*, 492 U.S. at 322 (reversing conviction because jury could not express a "reasoned

moral response" to evidence of mental retardation and childhood abuse); *Skipper v. South Carolina*, 476 U.S. 1, 2 (1986) (reversing conviction when State prohibited consideration of evidence that defendant "made a good adjustment" during incarceration); *Sumner v. Shuman*, 483 U.S. 66, 77-78 (1987) (invalidating statute that prohibited individualized consideration for defendant convicted of murder while serving a life sentence); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (invalidating Florida jury instructions prohibiting jury from considering non-statutory mitigating evidence); *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (holding that State may not restrict juries to consideration of only unanimously found mitigating circumstances).

Defense counsel's failure to investigate and present *available* mitigating factors equally undermines the reliability of the sentencer's "appraisal of [the defendant's] moral culpability. *See, e.g., Williams v. Taylor*, 529 U.S. at 398. It is only when available mitigating evidence is considered that "we can be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotation marks and citation omitted).

Williams v. Taylor reaffirmed that capital defense counsel's duty under *Strickland* encompasses a thorough investigation of the defendant's life history. Trial counsel in *Williams* failed to conduct an investigation that would have uncovered evidence of Williams' "nightmarish" childhood. This Court held that trial counsel had failed to fulfill the "obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396. Justice O'Connor (joined by Justice Kennedy) reiterated in concurrence that Williams' counsel had failed to conduct the

"requisite, diligent investigation" into Williams' "troubling background and unique personal circumstances." *Id.* at 415 (O'Connor, J., concurring).

Williams merely confirmed the consistent understanding of numerous courts of appeal that *Strickland* requires counsel to perform a thorough investigation for mitigation evidence, and that counsel's failure to do so constitutes deficient performance absent justification for believing such an investigation unwarranted. As the *en banc* Fifth Circuit held unanimously, "we consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Neal v. Puckett*, 296 F.3d 230, 236 (5th Cir. 2002) (internal quotation marks and citation omitted). "In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999) (internal quotation marks and citation omitted). *Coleman v. Mitchell*, 268 F.3d 417, 450 (6th Cir. 2001) (case law "has strongly established defense counsel's Sixth Amendment duty to independently investigate in preparation for the penalty phase of a capital trial"); *see also Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001) (*en banc*); *see Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994) (defendant's lawyers must "collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial"); *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigation evidence."); *Jermyn v. Horn*, 266 F.3d 257, 304-308 (3d Cir.

2001); *Emerson v. Gramley*, 91 F.3d 898, 905-907 (7th Cir. 1996).

State appellate courts have interpreted *Strickland* in the same manner. "[T]he failure to present mitigating evidence at trial can be reasonable if shown to be the result of [a] tactical decision, the failure to investigate the existence of such evidence is ineffective assistance of counsel." *State ex rel. Busby v. Butler*, 538 So. 2d 164, 171 (La. 1988). *See Rose v. Florida*, 675 So. 2d 567, 572 (Fla. 1996) ("It is apparent from the record that counsel never attempted to meaningfully investigate mitigation, and hence violated the duty of counsel to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.") (internal quotation marks and citation omitted); *Goad v. Tennessee*, 938 S.W.2d 363, 370 (Tenn. 1996) ("[C]ounsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases."); *Hodge v. Kentucky*, 68 S.W.3d 338, 344 (Ky. 2002) ("[I]t appears that neither [defendant's] defense counsel conducted any investigation. . . . If there was no investigation, then their performance was deficient."); *Turpin v. Christenson*, 497 S.E.2d 216, 227 (Ga. 1998) ("[B]efore selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing."); *People v. Morgan*, 719 N.E.2d 681, 704 (Ill. 1999) ("[D]efense counsel has a duty to make a reasonable investigation for mitigation evidence to present at the capital sentencing hearing, or must have a sound reason for failing to make a particular investigation."); *Commonwealth v. Smith*, 675 A.2d 1221, 1223 (Pa. 1996) (ineffective assistance when "[t]rial counsel neither pursued nor presented any evidence of mental state at the penalty

phase even though some evidence may have existed"); *State v. Wright*, 653 A.2d 288, 299 (Del. 1994) ("While there is no absolute duty to present all potentially mitigating evidence for use at the penalty stage, defense counsel has a general duty to investigate potentially mitigating evidence.").

Purported tactical choices by defense counsel unsupported by adequate prior investigation constitute defective performance under *Strickland*. As the Eleventh Circuit has noted, "case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). *See also Coleman v. Mitchell*, 268 F.3d 417, 447-54 (6th Cir. 2001) (counsel could not make a reasoned decision to forgo mitigation in favor of a lingering doubt defense because counsel had not investigated, and therefore did not realize he could have presented strong mitigation based on the defendant's abusive childhood); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (counsel's decision to focus on "sympathy and mercy," rather than a mitigation case, was unreasonable when counsel did not thoroughly investigate available mitigation evidence before choosing his strategy); *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding *Strickland* violation, even though counsel's decision could "be considered a strategic one, [because] it was a decision made without undertaking a full investigation"); *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995) ("if limiting the investigation was not reasonable, then neither was the subsequent strategic choice"); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) ("Thus, our case law rejects the notion that a strategic decision can be reasonable when the

attorney has failed to investigate his options and make a reasonable choice between them.") (internal quotation marks and citation omitted). Indeed, in the absence of a thorough investigation, counsel cannot "competently advise [the client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue. *Battenfield v. Gibson*, 236 F.3d at 1229.

The Court of Appeals noted that Respondent's trial counsel recognized that a psychiatric defense might be viable, that counsel had a psychologist appointed to examine Respondent for a limited purpose and obtained $35,000 for additional mental health testing, but never used these additional funds purportedly because Respondent would not cooperate. *Douglas v. Woodford*, App. at 8. However, counsel's responsibility did not end because of Respondent's lack of cooperation. Not only was "there . . . a significant alternative source of information that was readily discoverable," the file pertaining to Respondent's prior offense which identified a psychologist who had thoroughly examined Respondent four years earlier, but also "it was easy to ascertain that Douglas' line of work exposed him to toxic solvents," App. at 14, and "evidence regarding a serious head injury . . . could have been detected from medical records." *Id.* Trial counsel stated he "would have loved" to have had this information at Respondent's trial, and Petitioner conceded it was "professional error" for trial counsel not to have uncovered the previous psychologist. *Id.* at 10. The Court of Appeals also found that trial counsel was ineffective in his investigation of Respondent's background and social history. *Id.* at 11-14. Had trial counsel investigated sources of information

available at the time of trial, he could have presented the following at trial:

> "Douglas was abandoned as a child and raised by foster parents, including an abusive alcoholic foster father who locked him in a closet for long periods of time. He grew up in an extremely poor Chicago neighborhood where children had to scavenge for food in garbage cans and often ate lard or ketchup sandwiches. After running away at the age of fifteen to join the Marines, Douglas was arrested and put in a Florida jail where he was beaten and gang-raped by other inmates. . . .
>
> In the Marines, Douglas earned a number of medals and commendations and also helped rescue two drowning sailors. Another witness [would have] testified that Douglas had been very helpful to her during her pregnancy and marital difficulties.
>
> Finally . . . additional evidence [was available] of possible brain damage. After the military, Douglas began working in furniture refinishing and was exposed to toxic solvents daily. In 1967, Douglas was involved in a serious auto accident and suffered a concussion and damage to his left temporal lobe. He also consumed a great deal of alcohol on a daily basis from 1966 to 1977."

Douglas v. Woodford, App. at 12-13.

Petitioner mistakenly claims that the Court of Appeals did not assess the reasonableness of trial counsel's investigation in 1988, but rather determined his effectiveness on the basis of evidence developed by habeas counsel. Petition at 16-17. On the contrary, the Court of Appeals recognized that trial counsel was on notice contemporaneously about Respondent's mitigating mental health and

social history. *Douglas v. Woodford*, App. at 13-14. With respect to Respondent's background and social history, the Court of Appeals determined there was available information from sources other than Respondent that trial counsel failed to discover on a large range of potentially mitigating evidence, including evidence trial counsel had:

> "In sum, although [trial counsel] did perform some investigation, it was constitutionally inadequate. The information [trial counsel] did obtain about Douglas's troubled childhood revealed the need to dig deeper, and he did not adequately prepare the witnesses in order to present the material he did gather to the jury in a sufficiently detailed and sympathetic manner."

Id. at App. 14.

As federal and state courts applying *Strickland* have consistently held in comparable circumstances, counsel's knowledge of the rudimentary facts contained in Respondent's history does not discharge the duty to investigate, but triggers it. *See, e.g., Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective when he was aware of defendant's "extraordinary history of exposure to pesticides and toxic chemicals, yet he neither investigated fully this history nor informed the experts who examined [the defendant] of those facts"); *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel . . . to put him on notice" that he should have pursued further investigation); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel had "a small amount of information" that necessitated further inquiry); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991) (counsel ineffective when "his belief that mitigating evidence was

too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence"); *People v. Morgan*, 719 N.E.2d 681, 705 (Ill. 1999) (finding ineffectiveness when, "despite being aware of defendant's mental condition and brain damage, defense counsel failed to conduct an investigation into this relevant potential mitigation evidence"); *Commonwealth v. Smith*, 675 A.2d 1221, 1233-34 (Pa. 1996) (ineffective assistance when "record reflect[ed that defendant] suffered some mental problems," yet counsel "neither pursued nor presented any evidence of mental state at the penalty phase.")

Petitioner also erroneously asserts that counsel's deficient performance was excused because of Respondent's failure to cooperate. Petition at 9.[3] Such a rule would make the client the sole source of mitigating evidence, regardless of his mental condition or his ability to provide investigative leads. In any event, the Court of Appeals carefully considered only the evidence trial counsel could have readily developed without Respondent's cooperation. *See* App. at 8-9 n.2.

Trial counsel's duty to investigate and make intelligent tactical decisions based on that investigation cannot be discharged simply because of his client's reluctance or opposition. *See Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994); *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991), *cert. denied*, 504 U.S. 946 (1992); *United*

[3] Petitioner mischaracterizes Respondent's failure to cooperate as "roadblocks." (Petition, p. 9) Respondent merely did not agree to comprehensive psychological testing and "was not forthcoming with useful" social history information. *Douglas v. Woodford*, App. at 13.

States v. Gray, 878 F.2d 702, 712 (3d Cir. 1989); *People v. Mozingo*, 34 Cal. 3d 926, 934, 196 Cal. Rptr. 212 (1983). In sum, "[c]ounsel's duty to investigate mitigating evidence is neither entirely removed nor substantially alleviated by his client's direction not to call particular witnesses to the stand." *Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002).

CONCLUSION

The Ninth Circuit correctly applied settled law as announced by this Court and as applied consistently by the circuit courts and the state courts, to find both ineffective performance by trial counsel in the penalty phase of trial, and resulting prejudice. The petition for writ of certiorari should be denied.

Respectfully submitted,

MARK E. OVERLAND
Counsel of Record
MARK A. BORENSTEIN
JULIE M. RUHLIN

Attorneys for Respondent